

Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant

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Courts acknowledge that imposing multiple punitive damages on a single defendant for a single act or course of action that injures many plaintiffs is unjust, but have proclaimed themselves powerless to stop the injustice. By using their common law powers, however, courts could enact a dollar-for-dollar setoff for punitive damages already paid to other plaintiffs. In this article, the author argues that a dollar-for-dollar setoff would solve the problem of punitive damage overkill while increasing the respect given to juries' determinations of punitive awards. Additionally, the author explores how dollar-for-dollar setoffs avoid the arbitrariness of caps and ratio limitations currently favored by some legislatures, as well as the manipulations possible under a proposed system of awarding punitive damages only to the first successful plaintiff. The author concludes that, by adopting a setoff for punitive awards already paid for a single act or course of action, judges could create a more fair system while allowing punitive damages to serve the policies for which they were created, all without legislative intervention of any sort.

I. INTRODUCTION

A recent short article in the American Bar Association Journal began, “[n]othing troubles American business quite like the threat of a huge award of punitive damages.”¹ The law of punitive damages allows imposition of awards tailored to a defendant’s wealth and a trier of fact’s perceptions, formed years later, about the egregiousness of a defendant’s conduct. In this regard, punitive damages are an anomaly in American civil law, which generally focuses on compensation rather than punishment.² It is the very incalculability of the remedy

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¹ David G. Savage, *Slicing Punitives: Pocketknife Case May Set Standard of Review*, A.B.A. J., Feb. 2001, at 34.

² In broadest strokes, contract law bans liquidated damages when they impose a penalty for breach rather than attempt to place the parties in the position they would have been in absent the breach. See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981); 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1057, at 333–34, § 1077, at 438 (1964); 22 AM. JUR. 2D *Damages* § 686 (1988). Tort law damages seek to place the injured party in the pre-accident position, to the extent money can do so. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977); 1 DAN B. DOBBS, LAW OF REMEDIES, § 1.1, at 3, § 3.1, at 277 (2d ed. 1993); 22 AM.

that makes it effective. If bad actors can estimate accurately what certain conduct will cost in court and can build that cost into the price of doing business, then there may be little to stop them from hurting others.

As frightened as businesses may be of the wrath of juries, they are shielded from jury punitive verdicts by several layers of judicial protection. After juries set damages, their decisions frequently are eroded significantly, as trial judges, appellate courts, and even parties' own bargaining act to assure that only infrequently will a defendant pay the amount set by a jury. Many newspaper reports will feature a dramatic jury award while far fewer stories contain the information about the reduced, and therefore less impressive, amounts actually awarded, or the still lesser amounts later paid.³

The system of awarding and reducing punitive damages, which may function well enough in the case of a single plaintiff suing a single defendant, reveals significant flaws when many plaintiffs sue a single defendant for a single act or course of conduct that injures many people. In such a case the courts face a potential injustice that is easy to illustrate: Imagine a passenger airline that allowed a pilot to fly after learning that he was suicidal. If that pilot intentionally crashed an aircraft carrying 100 people, each one will have a right to sue the airline in an independent trial, asking not only for full compensation but also for an additional amount to punish the airline for its failure to ground the pilot. Assume, for ease of illustration, that every potential plaintiff will bring a separate action and win a judgment for compensatory damages. Assume further that the first case to reach judgment results in a punitive award of \$100 to punish and deter the bad conduct. If the second trial reaches the same conclusion then the defendant will pay another \$100 (\$200 total) even though both triers of fact agreed that defendant should pay only \$100 for punishment and deterrence. If 100 separate trials conclude that the airline should pay \$100 in punitive damages, the airline would then suffer judgments of \$10,000 when the most anyone believed appropriate was 100 times smaller than that number. The first federal court to discuss this phenomenon in the modern era labeled the problem "overkill," and dealt with it by holding that a jury's punitive award of \$100,000 should be reduced to the \$5,000 or \$10,000 range in anticipation of future litigation.⁴ This case set a pattern, repeated often, in which courts lament the unfairness of multiple, independent punishment for a single act, and then remit damages in anticipation of litigation that has yet to reach a verdict, or in some cases, has not even been filed yet.⁵ The result is a wasteful, cynical cycle of juries establishing

JUR. 2D *Damages* § 26 (1988).

³ See, e.g., *Tort Reform Moderating*, THE AUSTIN AMERICAN-STATESMAN, Mar. 11, 1996, at A6 (stating that few accounts of the famed McDonalds "hot coffee" verdict mention the drastic post-verdict reduction of punitive damages).

⁴ See *infra* notes 102-13 and accompanying text for a detailed exploration of the federal court decision in question.

⁵ See *infra* notes 114-21 and accompanying text.

damages and judges striking them down. This article proposes a way to end that cycle while blocking the injustice that can come from multiple, independent punishments.⁶

Some courts have been quite candid in admitting that the current regime of punitive damages doctrine fails to achieve justice when multiple plaintiffs sue a single defendant, but have gone on to claim that nothing short of Congressional legislation can combat the problem.⁷ Contrary to the uncharacteristically humble assertions of those judges meekly calling for some unspecified legislative rescue, a solution not only to overkill but also to the current profligate and premature use of remittitur, lies well within the current powers of courts. The essence of the proposal this article proffers is that courts create by common law an offset against punitive damage awards for punitive monies a defendant has already paid for the same act or course of action. The proposal would require that a defendant assessed for punitive damages would pay the greatest amount any court decided it should pay, but would not pay the same punitive dollar over and over to different plaintiffs, with each jury mistakenly acting as if it were the only actor imposing punishment on the wrongdoer.

This article first discusses the history and practice of punitive damage litigation, exploring the discomfort courts display over the remedy. It then examines the troubling phenomenon of multiple punitive damages and current responses to the possibility of multiple punishments imposing "overkill" on wrongdoers. Next, it explores some proposals to respond to the perceived problems with punitive damages. Finally, this article proposes that courts create

⁶ See *infra* notes 234–45 and accompanying text for the details of this article's proposed solution. American judges have acknowledged that it is unfair to permit multiple punishments for the same act. See, e.g., *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 553–56 (1943) (Frankfurter, J., concurring); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982); *Fischer v. Johns Manville Corp.*, 512 A.2d 466, 488 (N.J. 1986) (O'Hern, J., dissenting). Philosophical writers have also acknowledged that it is unfair to permit multiple punishments for the same act. Novelist Alexander Solzhenitsyn's fictional alter ego, Ivan Denisovich Shukhov, expressed for Soviet readers a helpless, resigned outrage at the injustice of being punished more than once for a single act. The fictional prisoner of Josef Stalin's prison camps had already served eight of his ten year sentence and

rather enjoyed having everybody poke a finger at him as if to say: Look at him, the term's nearly up. But he had his doubts about it. Those . . . [prisoners] who finished their time during the war had all been "retained pending special instructions" and had been released only in '46. Even those serving three-year sentences were kept for another five. The law can be stood on its head. When your ten years are up they can say, "Here's another ten for you."

ALEXANDER SOLZHENITSYN, *ONE DAY IN THE LIFE OF IVAN DENISOVICH* 70 (Ralph Parker trans., 1972); see also DENNIS PRAGER, *THINK A SECOND TIME* 134 (1995) (discussing the unfairness of multiple punishment for a single act).

⁷ See *infra* notes 134–245 and accompanying text for a fuller exploration of the options judges possess with which to combat the problem of "overkill."

by common law an offset against punitive damage awards for punitive monies a defendant has already paid for the same act or course of action.

The offset for punitive sums the defendant has already paid to other, previously successful members of an injured class would be performed by the court. The jury would continue to fulfill its traditional role of assessing the amount of damage suffered. As will be argued below, this way of addressing multiple punitive damages eliminates the injustice of multiple punishments, allows greater respect for jury decisions than the current system, better effectuates the policies for which punitive damages are assessed, and, most significantly, lies within the power of courts to implement without the involvement of state legislatures or Congress.

II. PUNITIVE DAMAGES: A DISTINGUISHED PEDIGREE FOR AN UNLOVED REMEDY

Punitive damages have a long and distinguished world history. American authors have traced their origins to the Code of Hammurabi, the Bible, and Roman law, as well as to the law of England.⁸ Judges, too, have mentioned this lineage in analyzing punitive damage awards.⁹ Nevertheless, a distinguished pedigree has not saved punitive damages from harsh criticism; the history of American discomfort over punitive damages goes back well over a century. In 1872, the Supreme Court of New Hampshire called punitive damages "a monstrous heresy . . . [A]n unsightly and unhealthy excrescence, deforming the symmetry of the body of the law."¹⁰ The Supreme Court of Washington decided in 1891 to bar the remedy, and this remains the law of Washington state.¹¹ Nor

⁸ See, e.g., GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW § 1.2 (1993) (tracing the doctrine to the Code of Hammurabi, Roman Civil Law, and English law in 1275); 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 1-1.3(A) (1995); STUART M. SPEISER ET AL., 2 THE AMERICAN LAW OF TORTS § 8:45 (1985) (tracing the doctrine to the Hebrew Bible and English law in 1763); G. Robert Blakey, *Of Characterization and Other Matters: Thoughts on Multiple Punitive Damages*, 60 LAW & CONTEMP. PROBS. 97, 110 (1997) (tracing punitive damages back to Roman law).

⁹ See, e.g., *In Re School Asbestos Litigation*, 789 F.2d 996, 1003 (3d Cir. 1986) (stating that punitive damages date from the Code of Hammurabi); 111 East 88th Partners v. Simon, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980) (finding punitive damages in the Code of Hammurabi, the Bible, and the law of England); *Nabours v. Longview S&L Ass'n*, 700 S.W.2d 901, 907 (Tex. 1985) (Kilgarlin, J., dissenting) (stating the availability of punitive damages in the Code of Hammurabi, the Bible, Roman, medieval, and English common law). *But see* *Shell Oil Co. v. Parker*, 291 A.2d 64, 68 (Md. 1972) (stating that Roman and Civil law did not have punitive damages).

¹⁰ *Fay v. Parker*, 53 N.H. 342, 382 (1872).

¹¹ *Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1073-74 (Wash. 1891) (disallowing punitive damages in state litigation); *Daily v. North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. Ct. App. 1996) (reaffirming the state's general ban on punitive damages).

were these the only early decisions criticizing the doctrine.¹² Nonetheless, the Federal courts and the overwhelming majority of states allow the imposition of punitive damage awards.¹³

A. *The Reasons for Punitive Damages*

1. *Punishment and Deterrence*

Vociferous dicta declaring the evil of punitive damages makes it important to explore why courts tolerate their existence. After all, punitive damages are a creation of the common law, and it lies within the power of courts to restrict the remedy, or even ban it entirely.¹⁴ The great majority of jurisdictions allow punitive damages to punish and deter malicious, aggravated, willful misconduct or reckless disregard for the rights and safety of others.¹⁵ According to the United States Supreme Court, “[t]he purpose of punitive damages is to punish willful or malicious conduct and to deter others from similar behavior.”¹⁶ Numerous state¹⁷

¹² See also *Murphy v. Hobbs*, 5 P. 119, 124–26 (Colo. 1884); *Pike v. Dilling*, 48 Me. 539, 544–45 (1861) (Rice, J., dissenting); *Bass v. Chicago & N.W. Ry.*, 42 Wis. 654, 672–73 (1887) (opinion of Ryan, C.J.).

¹³ A useful summary of state laws regarding punitive damages appears in Brian Timothy Beasley, Comment, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. REV. 2174, 2202–213 (1996).

¹⁴ See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 921 (1989); see also *supra* note 11 (providing citations to Washington's common law ban on punitive damages).

¹⁵ See, e.g., *Grace v. Waters*, 638 So. 2d 502, 503 (Fla. 1994) (“Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others.”); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 442 (Wis. 1980) (“Punitive damages rest on allegations which, if proved, demonstrate a particular kind of conduct on the part of the wrongdoer, which has variously been characterized in our cases as malicious conduct or willful or wanton conduct in reckless disregard of rights or interests.”); SCHLUETER & REDDEN, *supra* note 8, at 4.3(C)(1) (“Punitive damages can be obtained for aggravated misconduct. The specific criteria may vary slightly from jurisdiction to jurisdiction; however, generally the plaintiff will have to prove some form of malice, willful and wanton misconduct, or a reckless disregard for the rights and safety of the plaintiff.”). Willful and malicious behavior can take many forms. Some behavior causes little or no actual damage answerable in a meaningful compensatory award. For example, spitting in a person's face is surely uncivilized and ought to be discouraged, but it is unlikely to generate large compensatory damages. Punitive damages are a traditional way of providing a meaningful legal remedy that may punish and deter this churlish act. See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553 (1872); *Draper v. Baker*, 21 N.W. 527 (Wis. 1884).

¹⁶ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981) (“Punitive damages by definition are not

and federal¹⁸ courts have followed this line of reasoning, such that the commentators are generally agreed that:

In almost all jurisdictions in the United States where punitive damages are available, their stated purpose is nonremunerative. . . . The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct. Because punishing the defendant is akin to the purpose of deterring both him and others from such conduct, most courts that express this as a function of punitive damages will combine these two ideas.¹⁹

2. Dissenting Voices

Despite the overwhelming bulk of authority proclaiming punishment and deterrence as the twin goals of punitive damages, a handful of states have enunciated other goals as well. A few states have held that the purpose of punitive damages includes compensation for injuries to dignity.²⁰ These theories of punitive damages are, however, limited to a small number of states and are

intended to compensate the injured party, but rather to punish . . . the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.”).

¹⁷ See, e.g., *Grace*, 638 So. 2d at 504 (Fla. 1994); *Vaughan v. Taft Broad. Co.*, 708 S.W.2d 656, 660 (Mo. 1986); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 473 (N.J. 1986) (holding that punitive damages “are awarded to punish the wrongdoer, and to deter both the wrongdoer and others from similar conduct in the future.”); *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983) (holding that punitive damages “are not compensatory in nature”); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1270 (Or. 1980). The *Crookham* court stated that:

Punitive damages are allowed in Oregon to punish a willful, wanton, or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future. . . . This court agrees with the reasoning of *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), that contrary to early English theory, punitive damages under the modern view are not a substitute for compensatory awards nor an offset against litigation expense.

Id. (citations omitted).

¹⁸ See, e.g., *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990) (stating that “punitive damages are awarded primarily to punish a defendant for past conduct and to deter it and others from similar conduct in the future. . .”); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1041 (5th Cir. 1984) (identifying punishment and deterrence as “the basic policy objectives of punitive damages”); see also *supra* note 15.

¹⁹ SCHLUETER & REDDEN, *supra* note 8, §§ 2.2, 2.2(A)(1); see also DOBBS, *supra* note 2, § 3.11(1) (defining punitive damages as “sums awarded in addition to any compensatory or nominal damages, usually as a punishment or deterrent levied against a defendant found guilty of particularly aggravated [sic] misconduct, coupled with a malicious, reckless or otherwise wrongful state of mind”) (citations omitted).

²⁰ See *supra* note 15 regarding the imposition of punitive damages for spitting in another’s face, surely an injury to dignity but rarely a source of physical injury.

increasingly referred to not as "punitive damages," but as a separate category of "extracompensatory" or "augmented" damages.²¹ West Virginia stated as a third goal, after punishment and deterrence, that punitive damages exist "to provide additional compensation" in the hope that the lure of punitive damages will bring disputes to court rather than leaving them to private revenge.²² In some cases, the Connecticut Supreme Court has stated that it allows punitive damages not to punish defendants but to compensate for the costs of litigation.²³ Another Connecticut Supreme Court decision held that punitive damages are both compensatory and for punishment,²⁴ and yet another Connecticut Supreme Court opinion adopted deterrence as the policy underlying punitive damages.²⁵ Regardless of Connecticut's apparent confusion regarding the purpose of punitive damages, they are to be calculated in that state by the cost of attorneys' fees.²⁶ This measure of punitive damages should cause little discomfort since courts are familiar with setting appropriate attorneys' fees.²⁷ Indeed, judges have been held to be experts in the setting of appropriate attorneys' fees.²⁸

It is difficult to believe that West Virginia's concerns or Connecticut's assessment of attorneys' fees relies on a different policy than punishment and deterrence. If one were to ask, in the manner of a law professor questioning first-year students, *why* extra money or fees is given in certain cases, against the usual rule that parties receive the monetary value of their injuries and pay their own lawyers,²⁹ then the answer would be that this is a sort of case the law hopes to

²¹ See DOBBS, *supra* note 2, § 3.11(1).

²² Davis v. Celotex Corp., 420 S.E.2d 557, 560 (W.Va. 1992).

²³ See *Tedesco v. Maryland Cas. Co.*, 18 A.2d 357, 359 (Conn. 1941) ("Under our law the purpose of awarding so-called punitive damages is not to punish the defendant for his offense but to compensate the plaintiff for his injuries. . .") (citation omitted); *Lord v. Mansfield*, 717 A.2d 267, 271 (Conn. App. Ct. 1998).

²⁴ *Bodner v. United Services Auto. Ass'n*, 610 A.2d 1212, 1219 (Conn. 1992) ("Common law punitive damages . . . in Connecticut are limited to the plaintiff's attorneys' fees and non-taxable costs, and thus serve a function that is both compensatory and punitive.").

²⁵ *Champagne v. Raybestos-Manhattan*, 562 A.2d 1101, 1127 (Conn. 1989) (holding that Connecticut punitive damages are awarded "not merely to deter a particular defendant from future misconduct but to deter others from committing similar wrongs").

²⁶ See, e.g., *Tedesco*, 18 A.2d at 359 ("so-called punitive damages . . . cannot exceed the amount of plaintiff's expenses of litigation less taxable costs") (citation omitted).

²⁷ See, e.g., DOBBS, *supra* note 2, § 3.11(1).

²⁸ See, e.g., *Env'tl. Def. Fund, Inc. v. E.P.A.* 672 F.2d 42, 54 (D.C. Cir. 1982); *B-M-T Investment Co. v. Continental/Moss Gurdin, Inc.*, 437 F.2d 892, 893 (5th Cir.), *cert. denied*, 402 U.S. 989 (1971). *But see, e.g., Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544 (7th Cir. 1999) (imposing limits on the discretion of trial judges in setting the amount of attorneys' fees awarded without reference to the expertise of judges in the reasonableness of attorneys' fees); *Romberg v. Nichols*, 970 F.2d 512 (9th Cir. 1992), *cert. denied*, 506 U.S. 1075 (1993) (same).

²⁹ See, e.g., *Marek v. Chesney*, 473 U.S. 1, 8 (1985) ("under the 'American Rule,' each party ha[s] been required to bear its own attorney's fees"); *Alyeska Pipeline Serv. Co. v.*

encourage parties to bring. If one then asks *why* encourage this type of suit in preference to all the possible litigation that could be encouraged, the answer would be that the suit involves particularly egregious conduct that should not be allowed to go unchecked. In other words, the ultimate rationale for bringing cases to court with the bait of higher damages or attorneys' fees is to punish and/or deter the conduct.³⁰

Dissenting voices among the scholars considering the purposes of punitive damages include Marc Galanter and David Luban, who argue that the role of punitive damages extends beyond the rational enforcement of monetary pain. They make a case for viewing punitive damages as a civil punishment with moral dimensions that helps respond to a need for justice.³¹ Even in this broadest view of punitive damages, the authors' essential orientation is retributivist, recognizing that punitive damages inflict punishment on defendants.³² This article rests on the premise adopted by the vast majority of courts and scholars that punitive damages exist to punish and deter bad acts.³³

Not all courts and commentators agree that punitive damages have a salutary effect.³⁴ Nevertheless, the vast majority of American jurisdictions permit courts to impose punitive damages, allowing them to punish and deter certain bad conduct. Courts thus destroy the ability of parties to calculate their expected liability flowing from an act and engage in a rational but socially-undesirable gamble of their own money against someone else's misery.³⁵

B. Courts' Discomfort with Punitive Damages

Some commentators doubt the worth of punitive damages altogether,

Wilderness Soc'y, 421 U.S. 240, 247 (1975).

³⁰ See, e.g., *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) (noting that defenders of punitive damages argue they "are justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights") (citations omitted); *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985) ("The potential for recovering an exemplary award provides an incentive for private civil enforcement of society's rules. . . .")

³¹ Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1411-14 (1993).

³² *Id.* at 1432.

³³ See *supra* notes 14-32 and accompanying text.

³⁴ See, e.g., John Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. U. L. REV. 205 (1988); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998). See also *supra* notes 10-13 for early cases criticizing punitive damages and for a summary of punitive damages law in United States jurisdictions.

³⁵ See Beasley, *supra* note 13; see also *supra* notes 13-34 and accompanying text. See *infra* notes 64-69 for a discussion of the use of punitive damages to discourage profitable acts for a tortfeasor which society might deem undesirable.

believing they either do not punish and deter or do so only at too high a cost.³⁶ Even courts rejecting these extreme views evince discomfort with punitive damages, or at least with the amount of many jury-set awards.³⁷ Courts are ambivalent toward punitive damages for three apparent reasons: a perception that they are overused; an inescapable imprecision in setting their amount; and apprehension over the windfall they pay plaintiffs.

1. *The Supposed Litigation Explosion*

Popular press reports erroneously claim that the United States is in the midst of an unprecedented explosion of litigation with the indiscriminate use of punitive damages forcing legitimate enterprises out of existence.³⁸ These attacks on punitive damages often seem to stem from the belief that this nation over-litigates and that courts award far too much money to plaintiffs.³⁹ Careful, systematic studies show that no "explosion" of punitive damage awards is taking place,⁴⁰ but the available scholarship is not often presented to the public. News sources and even book publishers define their roles as presenting eyebrow-raising shocks about the failure of courts to operate properly.⁴¹ A messenger bearing the good news that the alarmists are wrong may very well find himself without the means to reach a wide audience.⁴² Professor Michael J. Saks recently reported that he approached publishers of books that proclaim the horrors of the supposed huge, unjustified verdicts of the litigation explosion about the possibility of writing a book recounting the careful studies that show no explosion going on. All popular

³⁶ See, e.g., *supra* note 34. But see, e.g., *All Things Considered* (NPR radio broadcast, Sep. 7, 2000) (including statement by industry analyst Martin Feldman that a class action lawsuit by airline flight attendants against the airlines for injuries they received breathing secondhand tobacco smoke had very few plaintiffs because a settlement agreement made punitive damages unavailable and that the promise of compensatory damages alone was insufficient to bring forth plaintiffs from among the injured class) (transcript on file with the author).

³⁷ See *infra* notes 79–84 and accompanying text for a discussion of the frequent remittitur of punitive damages.

³⁸ See, e.g., Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3–5 (1986); Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221 (1998).

³⁹ See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282–83 (1989) (O'Connor, J., concurring and dissenting).

⁴⁰ See, e.g., ERIK MOLLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985* 40 (1996) (noting that punitive damages awards are a rare event); MICHAEL RUSTAD, THE ROSCOE POUND FOUNDATION, *DEMISTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS* 7, 23–29 (1991); Galanter & Luban, *supra* note 31, at 1411–13 (reviewing the available data to conclude that punitive damages are rare and not excessive in amount); Saks, *supra* note 38, at 230–31 (same).

⁴¹ Saks, *supra* note 38, at 232–33.

⁴² *Id.* at 233.

press publishers refused.⁴³ One publisher defended himself against the Professor's charge of betraying the truth by offering only to publish a book showing an opposite disaster, that deserving plaintiffs are under compensated.⁴⁴ A book showing a well-functioning judicial system seemed to be of no interest to publishers. It thus appears a messenger bearing good news cannot find a popular press platform from which to declare the untruth of reports that the sky is falling.⁴⁵ Indeed, the available empirical data on when punitive damages are actually imposed tends to support the notion that this remedy is extraordinary, reserved for cases when egregious conduct demands a strong response.⁴⁶ Nevertheless, it is not only the lay public whose opinions are shaped by erroneous popular opinion. Justice Sandra Day O'Connor based a concurring and dissenting opinion on the "fact" that "[a]wards of punitive damages are skyrocketing."⁴⁷ This assertion was based in part on the popular press writings of Peter Huber, whose scholarly accuracy has been the subject of strong and detailed criticism.⁴⁸

2. Imprecision in Setting Punitive Damages

Punitive damage calculations are imprecise compared to awards of compensatory damages, which are often determined by something that is quite easily measured.⁴⁹ The driver who wrongfully destroys another's vehicle is subject to damages principally measured by the market value of the destroyed car.⁵⁰ The make, model, year, and mileage of the car are initial determinants of value,⁵¹ with the individual car's condition a great source of dispute. What cannot

⁴³ *Id.* at 232–33.

⁴⁴ *Id.* at 233.

⁴⁵ *Id.*

⁴⁶ See *supra* note 40.

⁴⁷ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282–83 (1989) (O'Connor, J., concurring and dissenting).

⁴⁸ See, e.g., Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1644–50 (1993) (criticizing the accuracy of Peter Huber's scholarship); Howard A. Denmark, *The Death of Law Reviews Has Been Predicted: What Might Be Lost When the Last Law Review Shuts Down?*, 27 SETON HALL L. REV. 1, 27–29 (1996) (same); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83–90 (1993) (same); Marc Galanter, *The Debased Debate on Civil Justice*, WIS. LAW., July 1992, at 6 (same).

⁴⁹ See, e.g., DOBBS, *supra* note 2, §§ 3.2–3.3 (stating that the calculation of compensatory damages, though at times complicated, is still measured against somewhat tangible things and with reference to conventions about what constitutes harm and how it is to be measured).

⁵⁰ See *id.*; see also, e.g., *Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982) (holding that negligent destruction of an automobile entitles the plaintiff not only to the market value of the destroyed car a moment before its destruction, but also that a motorist deprived of the use of his car by an accident that destroys it can collect an amount reflecting the loss of use of the car for a period of time reasonably necessary to procure a substitute).

⁵¹ See, e.g., N.A.D.A., OFFICIAL USED CAR GUIDE VII–IX (South-Western ed. Nov. 2000)

be denied, however, is that there exists a market for used cars, and the value of the destroyed vehicle will be determined with reference to that well-established market. The law quantifies many injuries less precise than the value of used cars, including death, bodily harm, and pain.⁵² Courts perform damage calculations for these items routinely, even without the certainty of a well-established market to set value.⁵³ Courts demand proof of damages to a reasonable degree of certainty, not permitting a plaintiff to assert value baselessly or "throw himself on the generosity of the jury. If he wants damages, he must prove them."⁵⁴ The failure to prove damages may result in dismissal of an action⁵⁵ or a compensatory award of nominal damages.⁵⁶

Compared with compensatory damages, the calculation of a proper amount of punitive damages lies on the outermost edge of vagueness.⁵⁷ As one California

(showing tables for how mileage, unexpectedly low or high, alters the value of used cars). The remainder of the used car guide shows amply that market price depends upon the make, model, and year of the car in question. *Id.*

⁵² See DOBBS, *supra* note 2, §§ 8.1, 8.3 (outlining the calculation of death and injury damages); see also, e.g., *Faught v. Washam*, 329 S.W.2d 588, 602 (Mo. 1959) ("From time immemorial, the judicial measure of damages for pain and suffering has been fair and reasonable compensation . . . because there is and can be no established standard, fixed basis, or mathematical rule by which such damages may be calculated"); DOBBS, *supra* note 2, § 7.4(3) (discussing compensable physical and emotional pain—the discussion is part of a treatment of damages in cases of civil rights violations, but applies equally in the much broader context of damages for other claims). But see, e.g., *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1046 (5th Cir. 1984) ("the very purpose of an action for wrongful death is to fix damages in money for what cannot be measured in money's worth").

⁵³ See *supra* note 52.

⁵⁴ *Taliferro v. Augle*, 757 F.2d 157, 162 (7th Cir. 1985); see also *Cates v. Eddy*, 669 P.2d 912, 920 (Wyo. 1983).

⁵⁵ Actual damages is an element of certain torts. Thus, a plaintiff's failure to show an actual injury is failure to prove a *prima facie* case, resulting in dismissal of the suit. See, e.g., RESTATEMENT (SECOND) OF TORTS § 907 cmt. a (1979) ("If actual damage is necessary to the cause of action, as in negligence, nominal damages are not awarded."); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 165 (5th ed. 1984) ("Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case.").

⁵⁶ In general, nominal damages are appropriate when the plaintiff proves a legal injury but fails to show damage. For example, a trespass to land consisting of someone walking on another's concrete driveway is a legal injury for which it is unlikely any monetary damage can be proved. In such a case punitive damages may be appropriate. The case becomes more complicated if the rules of a certain court forbid nominal awards. See, e.g., *Hewlett v. Barge Bertie*, 418 F.2d 654 (4th Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (holding that a tortious dent to a barge in a navigable waterway could not result in nominal damages, even though the dent caused legal but not monetary damage, forcing the court to choose between repair cost and no compensation).

⁵⁷ See, e.g., *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 208 (Cal. Ct. App. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 220 (Colo. 1984) (observing that "punitive damages do not admit of precise determination"); *Tetuan v. A.H. Robins Co.*, 738

court put it:

The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to "how much" is necessary to punish and deter.⁵⁸

Even punitive damage jury instructions approved by our nation's highest court give juries very little help in determining the amount of damages appropriate to the case before them. An instruction might inform the jury only that "[in] determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts."⁵⁹ This instruction drew the following comment in a concurring opinion by Mr. Justice Brennan:

Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.⁶⁰

The reason for the vagueness in setting punitive damages may flow from their very nature. The vast majority of jurisdictions in the United States use punitive damages to punish egregious wrongdoing and to deter repetition of such actions in the future.⁶¹ Punishment relies on inflicting enough pain (here a monetary discomfort) to make misbehaving defendants sorry for the bad act. Deterrence is based on imposing a sufficient amount of pain to overcome the will of misbehaving defendants or others inclined to misbehave, so they will not engage in the bad act in the future.⁶² Someone else's pain is difficult to measure, as is willfulness in the human heart.⁶³ A corporate entity has no "heart," but is

P.2d 1210, 1238-39 (Kan. 1987). See also *infra* notes 58-60 and accompanying text for an example of the vagueness of punitive instructions.

⁵⁸ *Devlin*, 202 Cal. Rptr. at 208.

⁵⁹ This instruction was at the heart of *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring), where the Court approved the instruction.

⁶⁰ *Browning-Ferris Indus.*, 492 U.S. at 281.

⁶¹ See *supra* notes 15-35 and accompanying text.

⁶² Professor Dobbs, in a forceful article, argued that the law should focus only on the actor in question and abandon the attempt to punish and to deter others. Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 846, 860 (1989).

⁶³ See *Devlin*, 202 Cal. Rptr. at 208 (containing the court's cleverly-worded recognition of

instead supposed to seek profit for its owners.⁶⁴ Thus, to the extent damages and litigation costs are predictable, parties can make rational decisions regarding which injuries to risk.⁶⁵ However, if willful or wanton conduct can be punished in unpredictable amounts, the damages can serve as a deterrent against risky behavior. The unpredictability of punitive awards is an important part of their deterrent power, since unpredictability interferes with decisions to maximize profits at the expense of injured parties.⁶⁶ It follows that measuring punishment and deterrence must always be imprecise. Moreover, proof of the high degree of outrageous misconduct necessary to justify a punitive award will necessarily be "wide and of an inescapably volatile nature."⁶⁷ Thus, it may appear to reviewing judges that awards of punitive damages are always a product of impermissible passion rather than rational calculation.⁶⁸ The inability to calculate an optimal

this point).

⁶⁴ See, e.g., *Walden v. Hillsborough County Aviation Auth.*, 375 So. 2d 283, 286 (Fla. 1979) ("The [c]orporation exists in order to make profits for its stockholders . . ."); *Midwest Physician Group, Ltd. v. Dep't of Revenue*, 711 N.E.2d 381, 388 (Ill. App. Ct. 1999) ("MPG is a for-profit corporation which exists for the primary purpose, indeed for the predominant purpose, of benefiting its physician/shareholders."); *Lambert v. Fisherman's Dock Coop., Inc.*, 280 A.2d 193, 196-97 (N.J. Super. Ct. App. Div. 1971) (contrasting the profit motive of a corporation with the democratic nature of a cooperative association). Courts have concluded that corporations, which can profit by bad behavior, should be required to answer for outrageous wrongs in punitive damages. See, e.g., *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989) ("If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit. . .") (citation omitted); cf. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909) ("[T]he corporation which profits by the transaction . . . shall be held punishable by fine. . ."); *Drayton v. Jiffie Chem. Corp.*, 591 F.2d 352, 374 (6th Cir. 1978) (Keith, J., concurring in part and dissenting in part) ("Punitive damages are needed . . . to put lawless corporations on notice. . ."); *EEOC v. CEC Entm't, Inc.*, No. 98-C-698-X, 2000 U.S. Dist. LEXIS 13934, at *56 (W.D. Wis. Mar. 14, 2000) ("[C]ommon sense dictates that it will take a larger punitive damages award to deter the wealthy corporation from future misconduct.").

⁶⁵ See Galanter & Luban, *supra* note 31.

⁶⁶ See *supra* notes 1, 63 and accompanying text. In a dominant case in the field of punitive damages, the Supreme Court asserts that, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Notwithstanding this language, punitive damage amounts remain effective because they are unpredictable. The predictability necessary to pass constitutional muster does not require exactness, but allows damages to be set by juries, subject to the reasonable review of appellate courts pursuant to some reasonable standards. *Id.*

⁶⁷ *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 198 (4th Cir. 1982).

⁶⁸ See *id.* Many jurisdictions hold that awards of punitive damages may be reversed if they are based on "passion and prejudice." See Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 ALR 5th 242, 318-21 (1993). However, this standard seems at odds with empirical reviews of courts' frequent remittitur of punitive awards. See *infra* notes 79-90 and accompanying text.

punitive amount and the broad-ranging and emotional evidence underlying an award undoubtedly contribute to courts' discomfort with measuring punitive damages. Paradoxically, however, it is precisely this unpredictability that gives the remedy its power.⁶⁹

3. Punitive Awards Give a Windfall to Plaintiffs

A further source of discomfort for courts is that punitive money, taken from the misbehaving defendant, is given to a plaintiff after the injury has already been fully compensated—as the law understands full compensation.⁷⁰ The inescapable consequence of adopting punishment and deterrence as goals of the punitive damage remedy is that money will be taken from the misbehaving defendant after the plaintiff has already been fully compensated.⁷¹ Successful plaintiffs cannot show why they are morally entitled to punitive damage money as they can so easily with compensatory awards, the logic of which is clear to anyone who has ever read a shopkeeper's sign declaring, "If you broke it, you bought it."

⁶⁹ See *supra* notes 1, 65–67 and accompanying text.

⁷⁰ Of course courts know that the law does not compensate all injuries fully. See, e.g., *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 68 (Cal. 1970). The *Helfend* court stated that:

[G]enerally the jury is not informed that plaintiff's attorney will receive a large portion of the plaintiff's recovery in contingent fees or that personal injury damages are not taxable to the plaintiff and are normally deductible by the defendant. Hence, the plaintiff rarely actually receives full compensation for his injuries as computed by the jury.

Id. However, once what has been deemed full compensation in the eyes of the law has been paid, punitive damages are often seen as undeserved money. See, e.g., *Smith v. Wade*, 461 U.S. 30, 87–88 (1983) (Rehnquist, J., dissenting); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) (stating that the "law authorizes punitive damage awards . . . reluctantly" because damages are usually only designed "to make the plaintiff whole"); *Hartford Accident and Indem. Co. v. Vill. of Hempstead*, 397 N.E.2d 737 (N.Y. 1979); *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1984) (remarking that "[a] party asking for exemplary damages . . . is whole and complete with actual damages"); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 471 (Wis. 1980) (Coffey, J., dissenting); KEETON, *supra* note 55, at 14 ("It is generally agreed that punitive damages are a windfall to the plaintiff and not a matter of right, and that it is always within the discretion of the jury or trial judge to withhold them.") (citation omitted).

⁷¹ See *supra* notes 15–35 and accompanying text. A commendably clear exposition of this point was made in *Merlo v. Standard Life & Accident Ins. Co. of Cal.*, 130 Cal. Rptr. 416, 426 (Cal. Ct. App. 1976), in which the court stated:

Compensatory damages and punitive damages are two different things with two different purposes. . . . When both compensatory and punitive damages are awarded, there is no double punishment. There may be double recovery, but, unless and until the Legislature sees fit to alter Civil Code section 3294, it is a permissible double recovery.

Id. But see *supra* note 70.

However articulately this point can be made, its analysis is fatally flawed. Setting the amount of punitive damages to punish and deter must focus on defendants—their misconduct, the amount necessary to punish them or deter them or others—and not on the plaintiffs' merits. In theory the most saintly and the most evil of plaintiffs should receive the same punitive damages, since the doctrine focuses not on the plaintiffs at all.⁷²

C. *Punitive Damage Realpolitik*

Legal standards effectively define when an instruction for punitive damages may be given.⁷³ Generally, the defendant's conduct must be extreme and outrageous, grossly negligent, wanton, willful, or intentional.⁷⁴ After that threshold is crossed a jury must then deliberate about the amount of punitive damages that may be appropriate. Increasingly, that deliberation is performed in the second part of a bifurcated trial so that the jury will not be prejudiced as it considers liability by evidence of a defendant's wealth, a factor that could prejudice the jury as it determines liability.⁷⁵ The punishment-setting phase is

⁷² See *supra* notes 15–35 and accompanying text for a discussion of the goals of punitive damages. The goal of punitive damages is not to enrich plaintiffs, but to take money away from a miscreant defendant. *Id.* Indeed, once the money leaves the defendant's hands, it might as well be burned in the public square as given to plaintiffs, because this too might serve a deterrent and punitive effect. Of course, such a plan might provide less encouragement to plaintiffs to bring certain suits, which helps both with deterrence and punishment. See *supra* note 30.

The irrelevance of where the money goes after defendants pay is the reason that schemes to pay punitive damages to the state have been upheld. See *Dunn v. Hovic*, 1 F.3d 1371, 1396 (3d Cir. 1993) (Weis, J., dissenting); *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1024 (Ala. 1992) (quoting *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 886 (Ala. 1991)); *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 97 (Cal. Ct. App. 1992) (Peterson, J., concurring). But see *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 475–76 (Or. 1999).

⁷³ See, e.g., *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994) ("Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others.") (citations omitted); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 442 (Wis. 1980) ("Punitive damages rest on allegations which, if proved, demonstrate a particular kind of conduct on the part of the wrongdoer, which has variously been characterized in our cases as malicious conduct or willful or wanton conduct in reckless disregard of rights or interests."); SCHLUETER & REDDEN, *supra* note 8, § 4.3(C)(1) ("Punitive damages can be obtained for aggravated misconduct. The specific criteria may vary slightly from jurisdiction to jurisdiction; however, generally the plaintiff will have to prove some form of malice, willful and wanton misconduct, or a reckless disregard for the rights and safety of the plaintiff."). Some limited empirical evidence indicates that awards of punitive damages are granted only when aggravated misconduct is present. See RUSTAD, *supra* note 40, at 7.

⁷⁴ SCHLUETER & REDDEN, *supra* note 8, § 4.3(C)(1).

⁷⁵ Bifurcated trials of punitive damages have been mandated by statute in a number of

where the law is strikingly vague.⁷⁶ Juries are asked to calculate the incalculable to the detriment of the wrongdoer, which incidentally benefits plaintiffs.

There is little to be done if a jury decides not to award punitive damages or to award a very small punitive amount.⁷⁷ Additur is rarely used to increase the amount of a punitive award.⁷⁸ Remittitur, however, is a common tool.⁷⁹ Legal

states. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West 1997); GA. CODE ANN. § 51-12-5.1(d) (2000); KAN. STAT. ANN. § 60-3701(a) (2001); MINN. STAT. ANN. § 549.20(4) (West 2000); MO. ANN. STAT. § 510.263 (West Supp. 2001); MONT. CODE ANN. § 27-1-221(7) (2001); NEV. REV. STAT. ANN. § 42.005(3) (Michie 1996 & Supp. 1999); N.D. CENT. CODE § 32-03.2-11(2)-(3) (1996 & Supp. 1999); OHIO REV. CODE ANN. § 2315.21(B) (West 2001); UTAH CODE ANN. § 78-18-1(2) (1996). Another group of states has instituted bifurcated trials by court decision. *See, e.g.*, *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 695 (Ala. 1996) (mandating bifurcation and suggesting that in the future punitive damages be paid to the State); *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (requiring a bifurcation to remove evidence of the wealth of the defendant from the liability portion of trial); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (same); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981) (same).

⁷⁶ *See supra* notes 57-69 and accompanying text.

⁷⁷ *See, e.g.*, *Wangen v. Ford Motor Co.*, 294 N.W.2d at 458 ("Plaintiff is not entitled to punitive damages as a matter of right. . . . The jury's refusal to award punitive damages is not reviewable. The amount awarded can never be unreasonably low.") (citation omitted). This is generally the law, however some contrary statutory authority and precedent exists. *See* 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2816 (1995 & Supp. 2001) (indicating the general unavailability of additur). *But see* ALA. CODE § 6-11-23-24 (1993 & Supp. 2000) (no presumption of correctness to apply to punitive damage figure awarded by triers of fact); MONT. CODE ANN. § 27-1-221(7)(c) (2001) (same); TENN. CODE ANN. § 20-10-101 (1994 & Supp. 2001); *Young v. Scott*, 700 P.2d 128, 134 (Idaho Ct. App. 1985) (additur of punitive award allowed in the context of a larger reduction in the amount of the compensatory award); *Micari v. Mann*, 481 N.Y.S.2d 967, 972-73 (N.Y. Sup. Ct. 1984) (after a lengthy analysis of courts' rejection of the power to grant additur of punitive damages and the basic policies underlying additur, trial court granted additur of punitive damages).

⁷⁸ *See supra* note 77.

⁷⁹ *See, e.g.*, *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1383 (5th Cir. 1980) ("district [c]ourts have not hesitated to remit even punitive damages.") (citations omitted); *Morrissey v. Nat'l Mari. Union of Am.*, 544 F.2d 19, 34 (2d Cir. 1976) (suggesting greater scrutiny for punitive awards than for compensatory awards); *RUSTAD, supra* note 40, at 39 (empirical review of twenty-five years of products liability verdicts led to the conclusion that "[a]ppellate courts more frequently reverse or remit punitive damage awards than they do compensatory damage awards"); *Galanter & Luban, supra* note 31, at 1409-10. Mr. Galanter and Mr. Luban note:

The frequency of remittitur is a noteworthy feature of the punitive damages landscape. Critics of punitive damages often point to what they regard as largely unfettered jury discretion in determining the size of awards. This focus neglects the equally unfettered discretion of judges in decreasing the size of punitive awards. Judges may . . . be exhibiting a probusiness tilt that is just as powerful as, and no more rational than, the antibusiness tilt that critics often attribute to juries.

Id. (citations omitted).

doctrine indicates that punitive damages are no easier for appellate courts to alter than are compensatory damages, but in actual practice courts remit punitive damages often and exhibit something like pride in how willing they are to do so.⁸⁰

Courts generally do not set aside an award of compensatory damages unless the amount indicates passion or prejudice, or evinces some other error by the trier of fact.⁸¹ While courts may still announce this highly deferential standard in reviewing punitive damages, it seems to pose little barrier to their reducing punitive awards.⁸² Moreover, some courts add another factor in their punitive damage calculation: that punitive damages should be the minimum amount of money necessary to punish and deter the bad conduct at bar.⁸³ Courts frequently reduce punitive awards by applying these standards, substituting for the jury's often-impenetrable calculus an equally inscrutable judicial decision that only a lower number will achieve justice.⁸⁴

Remittitur is not the only device that may reduce the amount of punitive damages defendants pay. One empirical study found that post-verdict negotiated settlements, appeals, and post-trial motions all reduce punitive damage payments significantly.⁸⁵ Studying punitive awards in San Francisco County, California and Cook County, Illinois from 1979 to 1983, one group of researchers found that defendants suffering punitive awards in excess of \$50,000 paid only forty-seven percent of the jury's original award.⁸⁶ Between 1980 and 1984, individual defendants suffering punitive damage verdicts in the jurisdictions studied paid thirty-one percent of the amounts awarded, with business defendants paying

⁸⁰ See Draper, *supra* note 68, at 318–21 (reciting the legal standard that punitive damage awards are to be respected except in cases of passion and prejudice, but that passion and prejudice are frequently found); Galanter & Luban, *supra* note 31 (stating that remittitur is frequent).

⁸¹ See *supra* note 80.

⁸² See *supra* notes 79–80 and accompanying text.

⁸³ See, e.g., *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (“[P]unitive damages . . . must not exceed an amount that will accomplish society's goals of punishment and deterrence.”) (citations omitted); *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991) (identifying as the key function of a court reviewing an award of punitive damages to make sure that the award was not larger than necessary to punish and deter); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 990 (Cal. 1978) (same); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459 (Wis. 1980) (“An award which is more than necessary to serve its purposes (punishment and deterrence) . . . is excessive and is contrary to public policy.”) (citation omitted).

⁸⁴ There is a general sense that judges do not often allow punitive damage awards to stand. See, e.g., *RUSTAD*, *supra* note 40, at 6 (reporting a statement by a successful trial lawyer in Utah that “[t]he history of punitive damages awards which have been upheld in this state has led most attorneys to believe that the likelihood of obtaining such an award is extremely low and the likelihood of keeping such an award on appeal is even lower”); Galanter & Luban, *supra* note 31, at 1409–10.

⁸⁵ MARK PETERSON ET AL., *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* 29 (1987).

⁸⁶ *Id.*

sixty-seven percent of the juries' awarded amounts.⁸⁷ Larger jury awards generally were satisfied with a lower percentage paid than smaller ones, with defendants satisfying awards of less than \$10,000 by paying an average of ninety-four percent.⁸⁸ Another study, considering 880 civil cases in San Francisco County between 1982 and 1984, found a payment rate of eighty-two percent in cases with only compensatory damages awarded; the payment rate in cases with punitive damages fell to fifty-seven percent.⁸⁹ One of the largest studies, purporting to examine twenty-five years of jury verdicts in products liability cases across the United States, concluded that punitive damages are "often scaled down in the post-trial period."⁹⁰ The data available indicate that jury awards are far from the last word on how much money a defendant will pay a plaintiff.

D. Conclusion

Punitive damages, vilified in dicta and venerated by long use, remain a powerful tool that courts have not relinquished. Judges do, however, show palpable discomfort with the remedy by severely limiting the amounts of jury-set punitive awards. A jury's award of punitive damages sets an outer limit from which frequent reductions are made by remittitur, appeal, and post-verdict bargaining. The amount paid may little resemble the award made.⁹¹ The system provides a set of devices to maintain a rather rickety balance, based on unfocused jury instructions and regular downward adjustments of punitive awards.

III. PUNITIVE AWARDS TO MULTIPLE PLAINTIFFS FOR A SINGLE ACT OR COURSE OF CONDUCT

The precarious balance of the system—juries awarding monies that judges routinely reduce—operates in a strained way in cases that do not generate repetitive suits. However, when a defendant's act or course of action injures many people, multiple suits are to be expected. In those cases the system fails. As is shown below, judges try to manage the total amount of punitive damages that will be paid in a course of litigation.⁹² To do this they must first determine how large aggregate punitive damages should be tolerated for all suits. Judges then consider how many other potential plaintiffs might win a suit and try to place the punitive damages in the cases before them into a context of suits not yet tried and perhaps

⁸⁷ *Id.* at 55.

⁸⁸ *Id.* at 29.

⁸⁹ MICHAEL G. SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS 38–39 (1987).

⁹⁰ See RUSTAD, *supra* note 40, at 38.

⁹¹ See *supra* notes 79–90 and accompanying text.

⁹² See, e.g., *infra* note 105.

not yet even filed.⁹³ Judicial intervention of this sort necessarily comes too early in the course of multiple-suit litigation, since it demands patently impossible predictions of outcomes in cases far from trial.⁹⁴ To understand how courts arrived at this impasse, the following section explores the history of multiple-plaintiff punitive damage litigation.

A. *The Early History of Multiple Awards*

Early cases found little difficulty in allowing more than one plaintiff to recover punitive damages against a single defendant. For example, the Supreme Court of Wisconsin held in 1914 that where a single act deserving of punitive damages—intercourse out of wedlock with a young girl—injured both the girl and her father, both plaintiffs were entitled to collect punitive damages.⁹⁵ The court announced that it did not find authority directly on point, but instead relied on established analogous law that a single act could violate the laws of a state and the Federal jurisdiction, thus subjecting a criminal defendant to two punishments not unconstitutionally redundant.⁹⁶ By 1917, the Supreme Court of Iowa was able to declare, in another case involving the seduction of a young girl in which the girl and her father both won punitive damages, “[t]his is a situation that has often been met. The fact that a defendant has or may be held liable for exemplary damages in one case has never been held as a defense in his favor against liability for exemplary damages in another case to another plaintiff.”⁹⁷

Few early decisions showed concern about possible injustice because of multiple punishments or because the total punitive damages might reach too high

⁹³ *Id.*

⁹⁴ Predicting the monetary outcome of even one case may be beyond human power. If this is so for an individual case, how much more so must it be true for a string of cases to be tried, if at all, in far-flung jurisdictions around the country? See *infra* note 111.

⁹⁵ *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914).

⁹⁶ *Id.* at 20. The fact of constitutionality by no means commands that courts adopt this result. In *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231–32 (10th Cir. 1970), the court regarded multiple punitive damages as a reason to deny punitive damages altogether under section 10(b)(5) of the Securities Exchange Act of 1934. The fact that the Constitution does not bar a practice hardly assures that it is the best course of action or even the only constitutional one. The Supreme Court of North Carolina reached an opposite ruling when a lower court had held, also without running afoul of constitutional limits, that punitive damages would be reduced in consideration of criminal penalties imposed for the same act. *Saunders v. Gilbert*, 72 S.E. 610, 615 (N.C. 1911). In the modern era several states deem such arguments relevant. See, e.g., ALASKA STAT. § 0.9.17.020(c)(7) (Michie 2000) (“[T]he fact finder may consider . . . the severity of the criminal penalties to which the defendant has been or may be subjected.”); KAN. STAT. ANN. § 60-3701(b)(7) (1994) (same); MINN. STAT. ANN. § 549.20(3) (West 2000); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1273 (Or. 1980); *Cooper v. Moscillo*, 592 P.2d 1034 (Or. App. 1979).

⁹⁷ *Reutkemeier v. Nolte*, 161 N.W. 290, 294 (Iowa 1917).

a sum.⁹⁸ In the era in which those courts wrote, suits by many plaintiffs against a single defendant for a single act were probably quite rare.⁹⁹ Moreover, the conduct being punished was of a type not likely to engage courts' sympathies for the defendant required to pay two punitive awards.¹⁰⁰ As modern manufacturing and commerce increased the number of potential plaintiffs who might each possess a potential claim for punitive damages, courts and commentators have become increasingly dissatisfied with the law that allows punitive damages for a single act to be awarded to many plaintiffs.¹⁰¹

B. Modern Awareness of the Problem of Multiple Awards

1. The Potential Harm of Multiple Awards

Modern judicial concern for the excessive imposition of multiple punitive damages for a single act appears first in *Roginsky v. Richardson-Merrell, Inc.*¹⁰² In that 1967 case, a pharmaceutical manufacturer was accused of marketing a high blood pressure drug which it knew or should have known would cause cataracts in some of the drug's users.¹⁰³ Many law suits resulted, with plaintiffs winning significant compensatory and punitive damage awards.¹⁰⁴ The Second Circuit Court of Appeals, acting as a New York court pursuant to diversity jurisdiction, proclaimed:

There is more to be said for drastic judicial control of the amount of punitive awards so as to keep the prospective total [of punitive damages defendant must

⁹⁸ But see, e.g., *Saunders*, 72 S.E. at 615 (demanding that civil punishment consider criminal penalties imposed).

⁹⁹ See, e.g., JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 2* (1998) (listing many causes of the rise of complex civil litigation, including new laws, such as securities regulation, mass torts, and employment discrimination, and the effects of the enactment of the Federal Rules of Civil Procedure in 1938, which made disposition of cases at the pleading stage less common); see also, *Palmer v. A.H. Robbins Co., Inc.*, 684 P.2d 187, 226 (Colo. 1984) (Erickson, C.J., dissenting).

¹⁰⁰ See, e.g., *supra* notes 95-97.

¹⁰¹ See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 469-71 (Wis. 1980) (Coffey, J., dissenting); Victor E. Schwartz et al., *Reining in Punitive Damages' "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1029-34 (1999); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983).

¹⁰² 378 F.2d at 839.

¹⁰³ See STEVEN FRIEDMAN & ROBERT E. BURGER, *FORBIDDEN CURES* 17-18 (1976).

¹⁰⁴ *Roginsky*, 378 F.2d at 834 n.3; FRIEDMAN & BURGER, *supra* note 103, at 17 (estimating that the company paid between \$45 and \$55 million to resolve the approximately 1,500 civil actions brought against it). But see *infra* note 115 and accompanying text.

pay] within some manageable bounds. This would require, for example, a reduction of the instant \$100,000 award to something in the \$5,000–\$10,000 range, still leaving defendant exposed to several million dollars of exemplary damages. We perceive nothing in the New York decisions that would prevent our reducing a punitive damage award because of the large number of suits arising out of the same conduct by the defendant.¹⁰⁵

Tellingly, the court noted that “[t]he New York courts have shown considerable readiness to reduce punitive damage awards”¹⁰⁶ despite the fact that New York’s law claims to impose a high standard of review for remittitur.¹⁰⁷ Nor is New York an anomaly in its eagerness to reduce punitive damage awards.¹⁰⁸

The court in *Roginsky* reluctantly declared that it had “the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill,” admitting that its holding left open the possibility of what it called “overkill.”¹⁰⁹ The *Roginsky* opinion thus allowed unlimited multiple punitive awards to be a doctrinal possibility, but combated overkill by guessing what possible future damages in possible future suits might be and with those other suits in mind, granted remittitur.¹¹⁰ The obvious limitation to this approach is the accuracy of judges in guessing how many suits will be brought, how many will survive pretrial motions, how many will settle and at what cost, and finally, the aggregate punitive award for all cases that go to trial. Even to state this Herculean task is to conclude that nothing short of divine prophecy could fulfill such a role.¹¹¹

Despite the patent flaws in trying to calculate the incalculable, the court

¹⁰⁵ *Roginsky*, 378 F.2d at 840 (footnote omitted). The footnote which follows the quoted paragraph sets forth five cases in which New York courts reduced punitive damage awards.

¹⁰⁶ *Roginsky*, 378 F.2d at 840 n.12.

¹⁰⁷ See, e.g., *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 722 (2d Cir. 1977) (a diversity case decided under New York law in which the court held, citing cases decided before *Roginsky*, that “[r]emittitur . . . is an expedient to be employed with circumspection. Since punitive damages by their nature do not admit of precise determination, their evaluation is properly within the discretionary province of the jury, and will be overturned only if ‘shockingly’ or ‘grossly’ excessive.”); *Diapulse Corp. of America v. Birtcher Corp.*, 362 F.2d 736, 744 (2d Cir. 1966) (a diversity action decided under New York law in which the court stated that the standard to remit a punitive award was abuse of discretion).

¹⁰⁸ See *supra* notes 79–84 and accompanying text.

¹⁰⁹ *Roginsky*, 378 F.2d at 839.

¹¹⁰ *Id.*

¹¹¹ It has long been recognized that predicting jury verdicts is no easy task. A nice statement of the problem appears in *Georgia Casualty Co. v. Mann*, where the Kentucky Supreme Court stated that: “[t]he gift of prophecy has never been bestowed on ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case.” 46 S.W. 2d 777, 779 (Ky. 1932). The ability of courts to perform accurately even the first link of this chain of prediction is subject to serious doubt.

asserted that judges should be active in reducing awards when overkill was threatened.¹¹² Like the Second Circuit Court of Appeals in *Roginsky*, other courts seem to need little urging to exercise the power of remittitur of punitive awards freely and frequently.¹¹³

2. Courts Proclaim Their Helplessness

Several courts have acknowledged that multiple awards of punitive damages can work an injustice.¹¹⁴ While some courts have chosen to maintain the status quo because they found that the threat of such an injustice is merely a theoretical one that has not proved real,¹¹⁵ others state that a solution lies beyond their power.¹¹⁶ What is most striking about courts' reactions to this problem is the number of judges who steadfastly declare that they can do nothing to improve

¹¹² *Roginsky*, 378 F.2d at 839-40.

¹¹³ See *supra* notes 79-84, 105-08 and accompanying text.

¹¹⁴ See, e.g., *Dunn v. Hovic* 1 F.3d 1371, 1386 (3d Cir. 1993); *King v. Armstrong World Industries*, 906 F.2d 1022, 1033 (5th Cir. 1990); *Roginsky*, 378 F.2d at 839; *Palmer v. A.H. Robbins Co., Inc.*, 684 P.2d 187, 226-27 (Colo. 1984) (Erickson, C.J., dissenting) (stating that the possibility of overwhelming punitive damage liability in a case of products liability for a faulty medical device was a real and serious concern, but admitted that he had great difficulty "perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered in such a way as to avoid overkill and unwarranted cumulative financial punishment"); *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994) ("We acknowledge the potential for abuse when a defendant may be subjected to repeated punitive damage awards arising out of the same conduct. Yet, like the many other courts which have addressed the problem, we are unable to devise a fair and effective solution."); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-66 (W. Va. 1992) (implying overkill could be a problem but finding the record in the case insufficient to warrant addressing the issue). The dissent found partial solutions in the "first-come" approach (for a discussion of this approach see *infra* notes 145-82 and accompanying text), allowing evidence of prior awards of punitive damages (for a discussion of this approach see *infra* notes 214-25 and accompanying text), and forced consolidation into one multi-party suit (for a discussion of this approach see *infra* notes 209-14 and accompanying text).

¹¹⁵ See, e.g., *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr.*, 515 F. Supp. 64, 109 (D.S.C. 1979) ("This court is unconvinced that the 'specter of overkill' is anything more than just that—an unrealized phantom or mental image."), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1271 (Or. 1980).

¹¹⁶ See, e.g., *Dunn*, 1 F.3d at 1386 ("[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products"), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir. 1991) (stating that multiple punitive damages are a "proper cause for concern," but that no legal principle allows the court to limit punitive damages to the first successful plaintiff); *Racich v. Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989) (allowing unlimited multiple punitive damage awards, stating that a national solution is required); *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1236 (D.N.J. 1989); *W.R. Grace & Co.—Conn.*, 638 So. 2d. at 505.

upon a bad situation.¹¹⁷ Granted, cases raising the issue of multiple punitive awards are difficult ones because they cross jurisdictional lines. Many of the cases that have spurred discussion in this area deal with asbestos, which has yielded a vexing set of suits that exemplify the threat of huge, complex, multi-plaintiff and multi-jurisdictional litigation about the worst kind of callous indifference to human suffering.¹¹⁸ Still, the problem of multiple punitive awards is not limited to asbestos litigation and so includes less extensive litigation that nevertheless raises the same issues of overkill on a smaller scale.¹¹⁹ Against this backdrop it is striking to find so many complaints by judges, who are usually confident of their powers, loudly proclaiming themselves helpless before this injustice and meekly calling for uniform national legislation because they see no solution within their purview.¹²⁰ Thus far the call for national action has gone unheeded and judges continue to adjust jury punitive verdicts freely.¹²¹

The logic sometimes employed in support of courts' helplessness is particularly troubling. Some courts have held that they must not disadvantage their forum's citizen-plaintiffs relative to the citizens of other jurisdictions in seeking punitive damages for a given injury.¹²² For example, the Fifth Circuit Court of Appeals noted in a Mississippi diversity case that:

there can be no doubt that the Supreme Court of Mississippi would hold that Mississippi citizens should not be denied the right to claim punitive damages awards and to seek recovery for probable future diseases . . . now accorded to citizens in other states.¹²³

The court expressed the opinion that:

Each of the many states touched by [asbestos] litigation has a strong interest in

¹¹⁷ See, e.g., *supra* note 116 and accompanying text.

¹¹⁸ See generally, e.g., PAUL BRODUE, *OUTRAGEOUS MISCONDUCT* (1985); BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 481–579 (2d ed. 1990) (discussing the remarkable conduct underlying the suits); see also, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335–36 (5th Cir. 1985) (“No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure.”).

¹¹⁹ For example, the seminal *Roginsky* case dealt with a prescription drug, not asbestos. See *supra* notes 102–05 and accompanying text. Courts confronted with non-asbestos cases have also expressed concern for multiple punitive damages. See *Dehaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970) (liability for securities fraud); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (liability for a medical device).

¹²⁰ See *supra* notes 114–16 and accompanying text.

¹²¹ See *supra* notes 79–84, 105–08 and accompanying text.

¹²² See, e.g., *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994); see also *infra* notes 123–32 and accompanying text.

¹²³ *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1334 (5th Cir. 1985); see also *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 405 (5th Cir. 1986).

ensuring that its citizens receive full compensation, regardless of when their individual claims accrue. Uncompensated victims could directly or indirectly burden the state itself. However, no state can control the tort law of another. A state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs, so that at least those individuals will not be impeded in the legal scramble for a share of insufficient assets.¹²⁴

That is, plaintiffs whose suits are brought outside the jurisdiction of a given court are reaping arguably unjust punitive awards that an out-of-state court is powerless to stop.¹²⁵ Courts seem to reason that if a bonanza of unfair punitive awards is going on elsewhere, they should let their own plaintiffs share in it because their restraint, however appropriate, might not be emulated by other courts. Perhaps the most dramatic expression of this line of thought comes from West Virginia appellate Judge Richard Neely, who wrote:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me.¹²⁶

Whether stated by courts as a rule or by a judge as a wry observation on judicial electoral politics, the tendency to favor local plaintiffs in this way would mean that if any court of the fifty states, or any federal court—including the territorial courts of Guam or American Samoa—articulates a new rule that benefits plaintiffs, local judges in New York and North Dakota would feel themselves bound to adopt rules no less favorable for their own plaintiffs. Patently, no logic compels this result, even if it might be good politics for elected judges.¹²⁷ No rule of law says that courts must grow ever more solicitous of local

¹²⁴ *Jackson*, 750 F.2d at 1330. The court's reasoning seems weak, given that punitive damages are paid only in addition to full compensatory damages. See *supra* note 69 and accompanying text; see also *Dunn v. Hovic*, 1992 U.S. App. LEXIS 22749, at *82 (3d Cir. Sept. 18, 1992) ("It is important to keep in mind that punitive awards are allowed only after full compensation has been awarded. . . . Elimination of punitive damages would not diminish compensatory verdicts.") (Weis, J., dissenting), *vacated by* 1992 U.S. App. LEXIS 25457 (3d Cir. Oct. 8, 1992). It is not the role of punitive damages to assure that worthy plaintiffs are kept off state assistance roles, but rather to see that punishment is visited on evildoers. See *supra* notes 15–35.

¹²⁵ See *supra* notes 122–24 and accompanying text.

¹²⁶ RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988). If true, Neely's view represents a great departure from impartial justice and would properly be branded a disgrace.

¹²⁷ See, e.g., *id.*; 2 AM. L. INST., *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 261 (1991) ("[T]he state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims."). This language, quoted with approval in *Dunn v. Hovic*, ignores the obligation of courts to give justice to all parties—even out-of-state manufacturers defending claims against state citizen-plaintiffs. *Dunn v. Hovic*, 1 F.3d

plaintiffs. Indeed, various jurisdictions adopt rules that disadvantage plaintiffs relative to those in neighboring jurisdictions, yet the wheels of justice have not ground to a halt. For example, while the courts of New Mexico allow punitive damages on a mere preponderance of evidence,¹²⁸ courts in neighboring Arizona force their plaintiffs to show entitlement by clear and convincing evidence.¹²⁹ The Washington Supreme Court ruled in the late 1800s that it would not allow punitive damages under state causes of action¹³⁰ and has reaffirmed that holding as recently as 1996.¹³¹ Finally, the broad willingness of judges to reduce punitive awards belies the idea that local courts act exclusively to benefit plaintiffs.¹³² With this false doctrine of aiding local plaintiffs to the punitive pot of gold discredited and with courts' cries for a national legislative solution unanswered, judges should seek just solutions from within their current range of powers.¹³³

C. Conclusion

The lack of fairness inherent in imposing multiple, independent punishments invites excessive intervention by judges into juries' decisions, resulting in a lack of respect for juries' verdicts. The self-reinforcing loop of disregarding jury verdicts presents an opportunity for improvement of the judicial system. Alternatives most frequently discussed by courts and commentators are discussed below as a backdrop to the change this article will propose.

IV. COMMONLY DISCUSSED ALTERNATIVES TO THE PROFLIGATE USE OF REMITTITUR

Litigants, courts, and commentators have explored the issue of multiple award overkill and have proposed various solutions. Suggestions, ranging from radical to modest, are considered below.

1371, 1386 (3d Cir. 1993).

¹²⁸ See *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 709 P.2d 649, 654 (N.M. 1985).

¹²⁹ See *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986).

¹³⁰ See *supra* note 11.

¹³¹ *Id.* Washington's two neighbors, Idaho and Oregon, have the preponderance and clear-and-convincing standards, respectively. See IDAHO CODE § 6-1604(1) (Michie 1998); OR. REV. STAT. § 18.537(1) (1995 & Supp. 1998). The latter two standards were imposed by the respective state legislatures rather than by the courts of those states, indicating that legislatures, like courts, are capable of providing different standards for punitive damages than even their neighboring states.

¹³² See *supra* notes 79, 84, 105-08 and accompanying text for a discussion of the profligate use of remittitur.

¹³³ See *infra* notes 224-45 and accompanying text for the solution this article proposes.

A. Abolish Punitive Damages

Perhaps the most radical suggestion has been to abolish punitive damages altogether. Some scholars have argued that the doctrine has outlived any usefulness it might have had, and should be abandoned.¹³⁴ As recently as 1985, the Supreme Court of Maine entertained an argument from defense counsel that the time had come to abolish punitive damages.¹³⁵ The court rejected the defendant's proposed radical change to Maine law, but the opinion did not treat the possibility as beyond the pale of argument, dignifying the issue with more than five pages of thoroughly-researched discussion.¹³⁶

In a more limited form of abolition, some statutory claims have been held not to include the possibility of punitive damages, notably in the fields of labor law¹³⁷ and securities regulation.¹³⁸ Like air crashes and product liability claims, suits against labor unions and fraudulent securities peddlers have great potential to involve many plaintiffs suing a single defendant. Every union employee may have the same complaint against the union and every buyer of stock has the same potential claim against the issuer or vendor.¹³⁹ The United States Court of Appeals for the Second Circuit, quoting *Roginsky* and its concern about overkill by multiple punitive damage awards, held in 1970 that punitive damages are not available for violation of section 17(a) of the Securities Act of 1933.¹⁴⁰ The Tenth Circuit expressed the same concerns voiced in *Roginsky* in ruling that violations of section 10(b)(5) of the Securities Exchange Act were not subject to punitive damages.¹⁴¹ These cases generally reflect the availability of punitive damages for federal securities violations.¹⁴²

A survey of applicable state and federal law leads quickly to the conclusion that there is no broad consensus that punitive damages should be abolished in broad classes of suits.¹⁴³ Such a radical solution to the problem of multiple punitive damages is not imminent, and, if one believes in the power of punitive damages to regulate behavior, is perhaps also quite inadvisable.¹⁴⁴

¹³⁴ See *supra* note 34.

¹³⁵ *Tuttle v. Raymond*, 494 A.2d 1353, 1355-60 (Me. 1985).

¹³⁶ *Id.*

¹³⁷ See, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940); *Williams v. Pac. Mar. Ass'n*, 421 F.2d 1287, 1289 (9th Cir. 1970) (citing *Vaca v. Sipes*, 386 U.S. 171, 195 (1967)); *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F. Supp. 290, 295 (D. Wyo. 1974).

¹³⁸ See, e.g., *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1284-85 (2d Cir. 1969).

¹³⁹ See *supra* notes 137-38.

¹⁴⁰ See *Globus*, 418 F.2d at 1285-86.

¹⁴¹ See *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231-32 (10th Cir. 1970).

¹⁴² See generally *SCHLUETER & REDDEN*, *supra* note 8, §§ 21.2(F), 21.3(A).

¹⁴³ See *Beasley*, *supra* note 13.

¹⁴⁴ See *supra* notes 4-36 and accompanying text.

B. Only the "First-Comer" Collects Punitive Damages

1. The "First-Comer" Rule

One proffered approach is to allow punitive awards only to the first plaintiff to reach judgment.¹⁴⁵ The rule would enshrine the first verdict as the sole and proper punitive award in a given course of litigation. The theoretical grounding for such a rule appears sound if one assumes that all triers of fact would agree on the amount of punitive damages the defendant deserves to pay for all of the danger and injury it created. In such a case, multiple awards of punitive damage are always going to be too large, since they demand more forfeiture than anyone thought just.¹⁴⁶ Perhaps it might even be argued, as a theoretical matter, that the law should assume all triers of fact should agree on the punitive amount. Unlike compensatory damages, punitive damages are awarded based on how much the defendant deserves to pay rather than by the damage plaintiff sustained.¹⁴⁷ Thus any trier of fact should consider the same conduct and, arguably, arrive at the same amount of punitive damages, theoretically without regard to the particular plaintiff's personality or specific injury. As a theoretical matter this might be somewhat defensible,¹⁴⁸ but it is hard to imagine a trial lawyer agreeing that sympathy counts for nothing as a matter of the practical reality of trial.

The "first-comer" rule could achieve a just result in a hypothetical court system in which all triers of fact agree on the exact punitive damage amount—in that imaginary world a defendant will pay exactly and only the punitive award at

¹⁴⁵ See, e.g., *Simpson v. Pittsburgh Coming Corp.*, 901 F.2d 277, 280–81 (2d Cir. 1990) (refusing to decide a due process challenge to a punitive award under the "first-comer" rule due to an insufficient factual record); *United States Mineral Prod. Co. v. Waters*, 610 So. 2d 20, 22 (Fla. Dist. Ct. App. 1992), *aff'd sub nom. W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 502 (Fla. 1994); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1270–72 (Or. 1980) (rejecting the "first-comer" approach); Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First-Comer" Doctrine)*, 11 A.L.R. 4th 1261 (1982) (collecting cases rejecting the "first comer" rule and stating that it has not been accepted by any court). *But see* *United States Mineral Prod. Co.*, 610 So. 2d at 22 (Nesbitt, J., concurring and dissenting) (supporting the "first-comer" rule). See also *infra* note 181 regarding statutory "first-comer" rules.

¹⁴⁶ See *supra* text accompanying notes 1–4.

¹⁴⁷ See *supra* notes 15–35 and accompanying text.

¹⁴⁸ Even theoretically, this proposition is subject to doubt. Taking the illustration of an airplane crash caused by gross negligence that injures or kills multiple parties, some injured parties may be low earners at the end of their lives while others might have long and bright economic futures. In those jurisdictions requiring awards of punitive damages to bear a proper ratio to the actual damages assessed, the notion that all triers of fact will award the same amount regardless of which plaintiff reaches judgment first is flawed even as a theoretical construct. See generally SCHLUETER & REDDEN, *supra* note 8, at § 6.1(C) (stating the widespread acceptance of the proportionality rule).

which all triers of fact would have arrived. It is true, of course, that only one plaintiff will receive the punitive award. Other litigants will receive the compensatory awards that the law defines they are due,¹⁴⁹ but nothing more. Some may see this as an injustice in that similarly situated parties would receive different awards,¹⁵⁰ but there is no injustice when the problem is viewed in light of the punishment and deterrence policies underlying punitive damages.¹⁵¹ Punitive damages encourage law suits.¹⁵² They exist to bring to bar bad conduct and to make its perpetrators pay the money necessary to make future actors hesitant to do the bad act and the present actor sorry to have done it.¹⁵³ Achieving these results requires that a defendant pay money the plaintiff does not deserve. If one focuses on the source of funds—the *raison d'être* for punitive damages being to punish a miscreant by a sort of civil fine—what happens to the money after it leaves the defendant's hand is beside the point. The key is that the villain has been made to pay.¹⁵⁴ If, instead, one focuses on the fact that some plaintiffs get punitive amounts above their full legal compensation while others do not, then the result will appear unjust, or at least random.¹⁵⁵ The current system works when a winner who, like the lottery winner, enjoys the favor of luck without having deserved to win more than other lottery players.¹⁵⁶ Perhaps it is undignified to view the award of damages, punitive or otherwise, as a lottery, but it may not be unjust. The lottery uses the incentive of undeserved jackpots to make citizens give money to the government uncomplainingly. Analogously, a way to assure that monetary punishment is visited on bad actors might be to tolerate awards of punitive damages to parties already fully compensated.¹⁵⁷ The analysis should not be guided by the fact that others no less deserving (which is to say they are just as

¹⁴⁹ See *supra* note 70 and accompanying text regarding the law's view of "full compensation."

¹⁵⁰ See, e.g., Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 279–80 (1999).

¹⁵¹ See *supra* notes 15–35 and accompanying text.

¹⁵² See *supra* notes 30, 36.

¹⁵³ See *supra* notes 15–35 and accompanying text for a discussion of the purpose of punitive damages.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., Cordray, *supra* note 150, at 279–80 (1999).

¹⁵⁶ Perhaps it could be argued that the first plaintiff breaks new ground, making subsequent suits easier. Thus, the later plaintiffs do not deserve the punitive awards nor do they need the additional incentive to sue, since victory is more easily assured. This may not be true in cases where new evidence casts light on the true perfidy of the defendant's acts. It further may not be true when a second plaintiff sues under a different legal theory requiring different proof. Finally, it is not necessarily true that the first plaintiff to be awarded or even collect punitive damages was the path breaker. In a situation in which multiple parties sue a single defendant, the order in which judgment might be reached is not necessarily an indication of which party first brought suit or completed discovery first. For a fuller discussion of the implications of this fact, see *infra* notes 159–66.

¹⁵⁷ See *supra* note 70.

undeserving of a recovery exceeding their injuries) will receive nothing beyond full legal compensation for their injuries. After all, deserving plaintiffs should still receive a judgment of full compensation and the point of punitive damages is not to give the plaintiff money, but to take it away from the defendant.¹⁵⁸ This objection to the “first-comer” proposal has only superficial merit.

The true flaws of the “first-comer” rule become apparent when one considers the reality that judges and juries in different jurisdictions systematically give higher or lower awards,¹⁵⁹ and that a single, wealthy defendant could control which case would reach judgment first.¹⁶⁰ Empirical research supports the conclusion that some jurisdictions award punitive damages more often¹⁶¹ and more generously than others.¹⁶² Even neighboring jurisdictions like the city of St.

¹⁵⁸ See *supra* notes 15–35 and accompanying text regarding the purposes of punitive damages. A federal district judge stated this point succinctly: “[B]ecause exemplary damages do not have a compensatory function, difficulty in equitably distributing awards is not the prime problem. In other contexts, the windfall nature of exemplary awards is tolerated as a price of private achievement of a public goal of deterrence.” *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff’d*, 623 F.2d 395 (5th Cir. 1980). Some courts have noted that punitive awards may bankrupt a company, leaving later plaintiffs uncompensated despite receiving awards of compensatory damages. See *supra* notes 123–24 and accompanying text. The proposal made in this article responds to this observation by eliminating duplicative awards. See *infra* notes 234–45 and accompanying text.

¹⁵⁹ See, e.g., THOMAS A. MAUET, *TRIAL TECHNIQUES* 14 (4th ed. 1996) (“[L]arge-city jury pools are usually seen as favoring plaintiffs, particularly in personal injury cases.”). See also *infra* note 161 (for an empirical study confirming this general impression).

¹⁶⁰ Under a “first-comer” rule that allows punitive damages only for the first case filed, the defendant might settle the first case or cases or bargain to prevent the cases from being filed while waiting for a filing in a defense-friendly jurisdiction to make its legal stand. For a discussion of the effects of punitive damages in settlement under the plan proposed in this article, see *infra* notes 241–45 and accompanying text.

¹⁶¹ Punitive damages are rarely awarded in any jurisdiction in the United States. See MOLLER, *supra* note 40, at 40.

¹⁶² See *id.* at 56. Rand’s Institute for Civil Justice conducted an analysis of civil verdicts between 1985 and 1994 in various American jurisdictions. A striking set of statistics regarding the amounts of punitive damage awards (expressed in 1992 dollars) in three contiguous Missouri jurisdictions for the years 1990 through 1994 is summarized below:

<u>Jurisdiction</u>	<u>Median Award</u>	<u>Mean Award</u>	<u>Maximum Award</u>
St. Louis City	103,000	8,753,447	82,400,000
St. Louis County	16,095	186,638	2,500,000
St. Charles County	7,537	114,500	618,966

MOLLER, *supra* note 40. As illustrated, Missouri counties varied dramatically in how much they awarded in punitive damages. The study, which included counties in California, Illinois, Texas, New York, and Missouri, showed other, similar wide variations in punitive awards. Thus, the empirical data shows what many practitioners have known for years—different counties award different amounts of damages. As a former law clerk for the Missouri Court of Appeals in St. Louis, I was not surprised to see empirical confirmation of what local trial lawyers knew about jury proclivities in the region. Later, as a litigator in New York City, I knew of the received

Louis and the county of St. Louis, Missouri, show dramatically different proclivities in punitive damage amounts awarded.¹⁶³

The "first-come" rule would enshrine the first award to reach judgment as the total proper punitive damage to be paid, barring all subsequent courts from considering what amount of punitive damages, if any, would best punish and deter the bad conduct. The grave defect is that a defendant could work to speed one case to trial while delaying others with all the tools at its disposal. Usually it is in the interests of the defense to slow down the trial because having one's client pay later is better than having the client pay today.¹⁶⁴ Yet one could easily imagine that cooperating with discovery requests for the chosen low-damage case would be given top priority by the defense, which would hold motions to a minimum and seek no stipulations for delay. This would not be the normal situation in most other litigation and certainly not for the cases that threatened larger recoveries for punitive damages.¹⁶⁵

A plaintiff's attorney who found a low-damage case speeding toward trial would have no incentive to complain under any rule, but certainly not under the "first-come" rule.¹⁶⁶ The attorney would be serving the interests of the client not only by speeding the potential flow of compensatory damages, but also by being in the favored "pole position" to receive punitive damages. One can easily see how the plaintiff and defense counsel would work together under such a rule to minimize the amount of the single award of punitive damages.

Adopting the "first-come" rule would allow defendants to take advantage of several sources of variation in awards. The rule would mean that new evidence of misconduct, or evidence of new misconduct, would not be relevant to punitive damages calculations after the first case was decided. New evidence of misconduct can develop when discovery in later cases reveals facts unknown in the first litigation. Evidence of new misconduct is typical of a course of conduct in toxic exposure cases when the tortfeasor is learning more about the hazards it imposes on others. A possible example lies in the asbestos cases. The asbestos makers engaged in an uninterrupted course of conduct by exposing their employees to asbestos for many years.¹⁶⁷ Before 1949, the major hazard of

wisdom that juries in Bronx County awarded high damage amounts in personal injury cases while in neighboring Westchester County juries gave far lower amounts to prevailing plaintiffs.

¹⁶³ See *id.*

¹⁶⁴ See, e.g., *United States v. Davis*, 52 F.3d 781, 782 (8th Cir. 1995) (stating that few defendants do anything but slow the resolution of cases); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 987 n.101 (noting the existence of a "traditional incentive for defendants to delay the progress of a case"). It stands to reason that a person would rather pay a judgment later than sooner, both because money has a time value and because, life and litigation being uncertain, one might not have to pay at all if the delay is long enough.

¹⁶⁵ See generally *supra* note 164.

¹⁶⁶ See *supra* notes 164-65 and accompanying text.

¹⁶⁷ See GEORGE A. PETERS & BARBARA J. PETERS, 3 SOURCEBOOK ON ASBESTOS

asbestos exposure known to asbestos makers was asbestosis.¹⁶⁸ In 1949, the first credible scientific links were drawn between asbestos and lung cancer.¹⁶⁹ Before that date the companies knowingly endangered their worker's health with a risk of asbestosis by exposing them to the substance.¹⁷⁰ This was a bad act, but a jury might legitimately find that, after employers learned of the asbestos-cancer link, exposing workers was a worse act requiring greater punishment.¹⁷¹ Later knowledge might make an earlier award of punitive damages inadequate when, for example, the asbestos producers continued the same course of conduct with greater knowledge of the harm they were doing. A "first-comer" rule might bar a later court from considering this issue.¹⁷²

Other potential sources of variation in awards which might also unjustly skew punitive verdicts include regional differences in the value of money. Costs of living differ around the country, so triers of fact might be expected to think of different amounts of money as sufficient to punish and deter. For example, taking 100 as a national average, the average cost of housing in Little Rock, Arkansas is 81.1, while in New York, New York it is 478.8.¹⁷³ Perhaps jurors assessing damages regarding a tortuous deprivation of housing would be inclined to value the punitive damages differently in those two cities.¹⁷⁴ Similarly, New Orleans, Louisiana jurors receive health care costing 75.9 with 100 as an average, while residents of Spokane, Washington pay 125.7 and nearby Tacoma's health care costs are 142.6.¹⁷⁵ The defendant in a nationwide case of wrongful denial of health care benefits might strongly prefer to have the single assessment of punitive damages in low-cost New Orleans rather than Spokane or Tacoma.

The "first-comer" theory also ignores differences between the sympathy certain plaintiffs might arouse. While the theory of punitive damages suggests a trier of fact will focus only on the conduct of the defendant in setting the amount,¹⁷⁶ few experienced trial lawyers would conclude that a jury will give the

DISEASES: MEDICAL, LEGAL, AND ENGINEERING ASPECTS 10-11 (1988).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See *supra* notes 167-71 and accompanying text.

¹⁷³ See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 490-91 (120th ed. 2000).

¹⁷⁴ Some jurisdictions have adopted a rule requiring punitive damages to be proportionate to actual damages awarded. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-81 (1996) (stating that such a rule has been mandatory in all United States jurisdictions since the 1850s); see also, e.g., *Plotnik v. Rosenberg*, 203 P. 438, 439 (Cal. 1921) (adopting a rule of proportionality for California); *Southwestern Invest. Co. v. Neeley*, 452 S.W.2d 705, 707-08 (Tex. 1970) (adopting a rule of proportionality for Texas).

¹⁷⁵ See U.S. DEPT. OF COMMERCE, *supra* note 173, at 491-92.

¹⁷⁶ See, e.g., *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 473 (N.J. 1986) (determining punitive damages "from the perspective of the defendant rather than of the plaintiff") (citations

same punitive award to a disagreeable plaintiff as to a sympathetic one.¹⁷⁷ Some victims may be quite unappealing even in death, and thus receive far less sympathy from a jury. Further, there is a surface appeal to the rule in many jurisdictions that a punitive award should not be too out-of-proportion to the actual harm done.¹⁷⁸ If a trier of fact adopts this logic, either out of its own sense of justice or through an instruction of the court, then the same evil deed that injured a healthy child and an elderly, terminal, homeless person must result in different punitive awards. By definition, proportional punitive damages must vary with the actual damages awarded to the plaintiff.

In sum, wealthy, sophisticated defendants can manipulate the “first-comer” rule to minimize punitive damages.¹⁷⁹ Some cases would be slowed by typical pretrial maneuvering while one chosen case would advance quickly to trial. Ideally for defendants, the chosen case would feature an unsympathetic plaintiff with low actual damages suing in a jurisdiction with a history of small punitive awards. Defendants’ power to speed and slow various cases would thwart justice under the “first-comer” rule by making sure this case reached judgment first.¹⁸⁰

Fortunately, the “first-comer” rule has been rejected by every court that has considered it.¹⁸¹ Despite its seeming theoretical promise, the ease with which it can be turned into a tool to thwart the purposes of punitive damages makes it a poor policy choice.¹⁸²

2. *A Variation on the “First-Comer” Rule*

omitted). This view is consistent with the major stated purposes of punitive damages, punishment and deterrence. *See supra* notes 15–35 and accompanying text.

¹⁷⁷ For example, in an airplane crash that would subject the airline to punitive damages, some passengers would be older than others, and thus will have lost less of their lives. Lost incomes will differ. Sympathy will also vary with circumstances. One thirty five-year-old dying in an accident might have lived alone, another lived in prison and was being taken to a court hearing, while still another might be a single parent and sole supporter of small children. Experienced trial lawyers know that the latter plaintiff will recover more damages, compensatory and punitive, than the first two plaintiffs.

¹⁷⁸ *See generally* SCHLUETER & REDDEN, *supra* note 8, § 6.1(C).

¹⁷⁹ *See supra* notes 159–72 and accompanying text.

¹⁸⁰ *Id.*

¹⁸¹ *See supra* note 145. *But see* FLA. STAT. ANN § 768.73 (West 2000) (adopting caps, ratios, and a variation of a “first-comer” rule); GA. CODE ANN. § 51-12-5.1 (2000) (adopting a “first-comer” rule for product liability cases); OHIO REV. CODE ANN. § 2315.21 (Anderson 2001) (purporting to adopt a “first-comer” rule for prior verdicts in any state or federal court); OKLA. STAT. ANN. tit. 23 § 91 (West 2000) (adopting a “first-comer” rule only for prior Oklahoma punitive judgments). Thus a small number of legislatures have taken the step courts have wisely disdained. It should be noted that courts have yet to interpret these recent statutes significantly in reported opinions, and some courts have struck down similar laws. *See, e.g.,* Wightman v. Consolidated Rail Corp., 715 N.E.2d 546 (Ohio 1999); *infra* note 194.

¹⁸² *See supra* notes 159–80 and the accompanying text.

A variation of the "first-come" rule, proposed to and rejected by a number of courts, though enjoying some scholarly support, is that all punitive damages paid be placed in a fund to be distributed in an equitable way to all parties injured by the defendant's misdeed.¹⁸³ The proposal does not address overkill, since it does not stop independent imposition of multiple awards. The goals of punishment and deterrence would seem to be met whether the money goes to one plaintiff, all plaintiffs, the State, or is burned in the public square as a warning to other would-be wrongdoers.¹⁸⁴ A common fund answers the objection to the "first-come" rule that it is unfair for similarly situated parties to receive different amounts, particularly with one or a few receiving a large amount and later plaintiffs not sharing in the punitive award.¹⁸⁵ Assuming that there is an unfairness in awarding punitive damages to only some members of an injured class, the proposal for a common fund nicely takes into account the question of who gets the funds. It does not, however, address the dictum that punitive damages are not for the benefit of the injured plaintiff, but for society's benefit in general.¹⁸⁶ One might address this

¹⁸³ See, e.g., *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1232 (10th Cir. 1970); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 n.11 (2d Cir. 1967). The Tenth Circuit stated that:

"As an alternative, it has been suggested that only the first jury should award punitive damages and that such damages should be paid into an escrow fund for the benefit of all plaintiffs who prove their claims within the period of the statute of limitations. . . . This unprecedented theory is little more than academically interesting."

deHaas, 435 F.2d at 1232 (citation omitted); see also Galanter & Luban, *supra* note 31, at 1455 n.302; Richard H. Gilden, Comment, *Punitive Damages in Implied Private Actions for Fraud Under the Securities Laws*, 55 CORNELL L. REV. 646 (1970). But see David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1324 (1976) (declaring such a plan impractical and founded on dubious premises). Professor Owen wrote that:

"[i]t has been suggested that the ideal solution to the problem [of multiple punitive damage awards] would be first to litigate all compensatory damages claims arising out of a mass disaster, thus fixing the manufacturer's liability in this regard, and then to measure and assess a single punitive damages award against the manufacturer for equitable distribution among the plaintiffs."

Id. (footnote omitted).

¹⁸⁴ See *supra* notes 15-35 for an analysis of the policies underlying punitive damages. Some courts have noted that punitive damages payable to the plaintiff have a bounty effect, urging would-be plaintiffs to bring their cases to court. See, e.g., *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting); *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985); *supra* note 30. To the extent punitive damages act as a lure to bring worthy cases to court that would otherwise go unresolved, it may not be beneficial to dilute that effect by spreading the damages to more parties or to otherwise assign punitive damages to anyone but the plaintiff.

¹⁸⁵ It is subject to debate whether there really is any inequity in awarding different punitive damages to different members of an injured class. See *supra* notes 149-58 and accompanying text for an explanation of why the policies underlying punitive damages do not make differences in punitive awards to plaintiffs a source of unfairness.

¹⁸⁶ See, e.g., *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996)

consideration by making some part of the punitive award payable to the government, as some states have.¹⁸⁷ Punitive damages in those jurisdictions add to general revenue and so benefit all citizens. However, if punitive damages are to serve as punishment and deterrence then the issue of who gets the money becomes secondary and the common fund alone cannot answer the question of overkill by multiple awards.¹⁸⁸

The major flaws in this proposal are two: first, the use of a common fund does not change the amount the defendant will pay, thus it is not directed toward solving the problem of multiple awards. The second flaw in the common fund proposal is that it lies outside the power of any court to grant it. No court may withhold damages awarded to a given plaintiff and save the money for years until a judge is satisfied that all cases of a certain sort have reached judgment, only to distribute the money to successful plaintiffs other than the one to whom the award was made.¹⁸⁹ Legislatures have such a power but have not exercised their control over punitive damages in this way.¹⁹⁰ It may be interesting to speculate about such a proposal, but courts cannot do it¹⁹¹ and legislatures show little inclination to do it.¹⁹² A practical solution cannot flow from such a combination.

3. Common Legislative Interventions

The most frequent act legislatures have undertaken in punitive damages law is to limit the amount of damages that can be awarded in a given case, either to a dollar cap or a multiple of compensatory damages.¹⁹³ Some, though by no means all, state courts have held that these interventions violate state constitutions.¹⁹⁴

("[T]he state and not the victim is considered the true party plaintiff because punitive damages do not compensate a victim for loss but serve to punish and deter. . . . Thus . . . Alabama punitive damages are awarded for the public benefit—the collective good.") (citation omitted); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995) ("Punitive damages in Mississippi . . . are fundamentally collective; their purpose is to protect society by punishing and deterring wrongdoing. . . . The benefits of the award are meant to accrue to society.") (citations omitted); *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983) ("Unlike . . . compensatory damages, which are to benefit the *individual* plaintiff, punitive damages are imposed to benefit society.').

¹⁸⁷ At least six states have legislated that an amount or percentage of punitive damages awarded to a plaintiff will be paid to the state. *See* Beasley, *supra* note 13, at 2202–13.

¹⁸⁸ *See supra* notes 15–35, 150–58.

¹⁸⁹ *See, e.g., deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970).

¹⁹⁰ *See* Beasley, *supra* note 13, at 2202–13 for a summary of legislative action regarding punitive damages.

¹⁹¹ *See supra* note 183.

¹⁹² *See* Beasley, *supra* note 13, at 2202–13.

¹⁹³ At least thirteen states have enacted legislation capping amounts of punitive damages in certain civil cases to a dollar amount or a multiple of punitive damages. *See id.*

¹⁹⁴ *See Lakin v. Senco Products*, 987 P.2d 463, 467 (Or. 1999); *see also* William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16,

A problem with maximum caps is that they ignore the possibility that a defendant of sufficient wealth or sufficient willpower may consider the imposition of the maximum allowable punitive damages to be merely a cost of doing business.¹⁹⁵ The tortious sale of a defective product certain to injure a small percentage of those who use it provides a good illustration: Only a few users of the product will be injured and fewer still will find a lawyer, bring suit, and reach judgment. If punitive damages are capped at a dollar amount or a multiple of actual damages of the few successful plaintiffs, the money might not be sufficient to punish or deter wrongdoers who profit by their acts. For example, Ford Motor Company's decision to market its Pinto automobile with a defect that made it likely to burn in a rear-end collision was based on the fact that curing the defect was projected to cost \$100 million more than paying compensatory damages to those injured.¹⁹⁶ A jury awarded the estate of a fatally burned occupant the entire amount of money Ford hoped to profit by its decision.¹⁹⁷ This amount was dramatically large—above the caps of all states imposing caps—but hardly seems excessive if one assumes that Ford's profit-motivated decision was not a societally desirable one and that courts ought to discourage that sort of profit-seeking.¹⁹⁸ Nor is the Pinto litigation the only example of a jury awarding punitive damages to deprive a manufacturer of the profit derived from a decision that endangers public safety.¹⁹⁹ By barring large awards that strip profits from

1999, at 1A (presenting an interesting analysis in the popular press of trends in this area).

¹⁹⁵ See, e.g., DOBBS, *supra* note 2, at 210–11; see *infra* and *supra* notes 194, 196–98 and accompanying text (for instances where the tortious behavior is profitable and juries unimpeded by caps have tried to use punitive damages to deprive a defendant of the profit of its bad acts); see also Andrea Moore Hawkins, Note, *Balancing Act: Public Policy and Punitive Damages Caps*, 49 S.C. L. REV. 293 (1998) (analyzing how arbitrary caps prevent punitive damages from performing their punishment and deterrence function). Some legislative caps have taken the factor of profit into account. See, e.g., ALASKA STAT. § 09.17.020(g)(2) (Michie 2001) (“[I]f the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain . . . it may award an amount of punitive damages not to exceed . . . four times the aggregate amount of financial gain. . . .”); KAN. STAT. ANN. § 60-3701(f) (Supp. 2000) (allowing 1½ times the financial gain if the profit exceeds the statutory cap).

¹⁹⁶ *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 370 (Cal. App. 1981).

¹⁹⁷ See Galanter & Luban, *supra* note 31, at 1436–38 for an analysis of the jury's punitive damage award in this case.

¹⁹⁸ See Beasley, *supra* note 13, for a summary of laws capping punitive damages.

¹⁹⁹ See *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 50 (Alaska 1979) (Burke, J., dissenting) (dissenting from the court's remittitur of an amount it found too high and explaining that the jury's award was equal to the total amount of profit a gun manufacturer made by not putting a \$1.93 safety device in each of a certain model of pistol. The majority declared this amount excessive without much analysis. The dissent provided the calculation essential to understanding the jury's purpose in awarding the amount.); cf. *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (acknowledging the power of punitive damages “to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability.”); *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 942 (Utah 1993) (making certain dishonest

manufacturers, caps and defined allowable ratios of actual-to-punitive damages deprive courts of the tools they need to achieve deterrence.²⁰⁰ The effectiveness of punitive damages in closing certain avenues of profit is destroyed by the legislatures' favorite intervention, caps and ratios.

Upon closer analysis, it is clear that caps and ratios do not prevent overkill below the level of the cap or multiplier. These legislative limits apply to a single case at bar. They do not prevent multiple suits which each impose damages below the statutory limit, but which can add up to an award larger than any trier of fact would impose.²⁰¹ Thus, the issue of overkill persists with caps and ratios.

Another problem with caps and multipliers is that they may be impractical where harms are real but not economic. For example, denying someone the right to vote will be hard to monetize.²⁰² Votes are not for sale, but are generally recognized as the basis of our representative democracy. The individual who denied others their voting rights may need to be deterred by a stronger remedy than the legislatively capped amount, and certainly by an amount more than any monetary damages a voter can prove for denial of the voting right.

Arbitrary caps are troubling precisely because they are arbitrary.²⁰³ Their preset limits undermine the function of punitive damages.²⁰⁴ Worse, they probably arise out of the general and quite questionable perception that legislatures must do something to curb runaway punitive awards. The vast explosion that one might conclude exists from reading the popular press²⁰⁵ seems to vanish when the light of actual research shines on the available data.²⁰⁶ Nevertheless, politics probably deals better with the general perception that

insurance practices unprofitable by imposing punitive damages).

²⁰⁰ See *supra* notes 15–35 and accompanying text for a discussion of the goals of punitive damages. *But see supra* note 195.

²⁰¹ See *supra* text accompanying note 4 for a numerical illustration of overkill with amounts of money below legislative caps. If, as is argued in this article, it is unjust to force defendants to pay punitive amounts greater than any jury found necessary, then the injustice exists if the overpayment is \$100 or \$1 million.

²⁰² In fact punitive damages have been awarded for denial of voting rights. *See, e.g.,* *Elbin & Dean v. Wilson*, 33 Md. 135, 145 (1870); *see also* *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (11th Cir. 1981) (denying \$1 million in punitive damages for depriving plaintiffs of their right to vote because of a lack of proof of bad faith, impliedly approving the use of punitive damages in cases of denial of the right to vote).

²⁰³ At least one court has found this a sufficient basis to invalidate statutory caps. *See* *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1095 (Ohio 1999) (holding that Ohio's civil justice reform measure was unconstitutional); *cf. Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 472 (Or. 1999) (ruling that Oregon's limitation on noneconomic damages impermissibly violated the jury's resolution of a factual inquiry).

²⁰⁴ *See* *Saks*, *supra* note 38; *see also* *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 554 (Ohio 1999) (focusing on the egregiousness of a defendant's misdeeds rather than the actual economic injury done).

²⁰⁵ *See, e.g., supra* note 38.

²⁰⁶ *See, e.g., supra* note 40.

punitive damages are out of control than with the research-supported conclusion that they are not. Accordingly, legislative action probably will more closely track public opinion than the fact that punitive damage awards are not enjoying a dramatic surge in use.

Courts calling for a legislative solution would do well to note the ill-fitting response of the legislation enacted thus far.²⁰⁷ Judges who sincerely believe they face a problem with multiple punitive damages might do well to abandon their hope of useful legislative intervention and search instead for a solution that lies within their power to enact.²⁰⁸

4. Joinder of All Suits

The problem of multiple awards of punitive damages for a single act only exists when plaintiffs bring multiple suits. The problem simply disappears if all plaintiffs are joined into one class action.²⁰⁹ Thus, if complete joinder can be enforced, it ends the threat of multiple awards. One might question the fairness of forcing Alaska plaintiffs to bring suit in Nebraska, and Hawaiians to sue in Massachusetts, but it would solve the problem of multiple imposition of punitive awards, since only one award could be made.²¹⁰ However, current court rules do not permit a suit in which parties cannot opt out of a class action and bring suit on their own.²¹¹ Thus, although judges may wish to encourage class actions, they are powerless to command into the class plaintiffs who choose to sue separately. Plaintiffs who prefer a different forum, wish to seek an early settlement, or whose counsel believe their clients will best be served outside the class action, cannot be prevented from opting out and bringing separate actions with separate punitive damage requests.²¹² Like the common fund proposal, a solution through forced

²⁰⁷ See *supra* note 116 for citations to some court opinions calling for national legislative intervention.

²⁰⁸ See *infra* notes 234–45 for the solution proposed in this article. It lies entirely within the power of courts to enact without legislative action.

²⁰⁹ See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1402 (3d Cir. 1993) (“If it were possible for a single jury to consider the extent of harm as well as the number of victims and then factor that data into a single punitive award . . . there would be no [further] basis for imposing punishment thereafter.”) (Weis, J., dissenting); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *FORDHAM L. REV.* 37, 61 (1983) (citing Clarence Morris, *Punitive Damages in Tort Cases*, 44 *HARV. L. REV.* 1173, 1194–95 (1931)) (proposing that when there are multiple claims, any assessment of punitive damages should be withheld until all compensatory damages claims can be resolved).

²¹⁰ See *supra* note 209.

²¹¹ See, e.g., *MOORE’S FEDERAL PRACTICE MANUAL FOR COMPLEX LITIGATION (THIRD)* § 30.23 (2000) (“[C]lass members must be given the option to exclude themselves from the litigation.”).

²¹² *Id.*

joinder lies beyond the power of judges to enact.²¹³ Moreover, not all suits will be litigated in federal court.²¹⁴ There is no procedural device to join together actions in the courts of several states if the parties do not agree to the joinder.

5. Argue to the Jury for Reduced Punitive Damages Because of Past Punitive Awards (Or: "Lay Off Me—I've Been Punished Enough")

In response to defendants' pleas of overkill, some courts have held that this argument is best presented to the jury.²¹⁵ As a practical matter, lawyers will be very unlikely to take this dubious opportunity. For example, a Florida intermediate appellate court advised a defendant that if it believed it had an argument to avoid punitive damages based on the amounts already paid, the proper place for that argument was before the jury.²¹⁶ The Florida Supreme Court, in affirming the opinion of the intermediate court, disagreed, stating:

[Defendant] Grace points out that advising the jury of previous punitive damage awards would actually hurt its cause. The introduction of such evidence would be extremely prejudicial to a defendant trying to convince a jury that its conduct is worthy of no punishment at all. We agree with Grace's position on this point.²¹⁷

The Florida Supreme Court is right; arguing both non-liability and mitigation for prior punitive damages to a jury would sound like a smorgasbord of contradictory lies. The argument would run (1) I didn't do anything deserving of

²¹³ *Id.*

²¹⁴ *E.g.*, *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984) (pharmaceutical product liability in Colorado state court); *Grace v. Waters*, 638 So. 2d 502 (Fla. 1994) (asbestos product liability in Florida state court); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980) (automobile product liability in Wisconsin state court).

²¹⁵ *See, e.g.*, *Palmer*, 684 P.2d at 215-16; *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1210 (Kan. 1982); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) ("We realize that defendants may be reluctant to alert juries to the fact that other courts or juries have assessed punitive damages for conduct similar to that being considered by the jury in a given case That is a risk of jury trial."); *Young v. Crookham*, 618 P.2d 1268, 1274 (Or. 1980); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40-43 (Tex. 1998) ("[W]e hold that evidence about . . . prior punitive damages awards that the defendant has actually paid for the same course of conduct is admissible when the defendant offers it in mitigation of punitive damages.") (footnote omitted); *Wangen*, 294 N.W.2d at 477, 459-60.

²¹⁶ *See United States Mineral Prods. Co. v. Waters*, 610 So. 2d 20, 22 (Fla. Dist. Ct. App. 1992), *aff'd sub nom. W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994) (involving an action seeking compensatory and punitive damages against manufacturers of asbestos containing products). It appears that a subsequent Florida statutory enactment makes this question moot in Florida. *See FL. STAT. ANN.* § 768.73(2) (West 1997) (providing for limitations on punitive damages).

²¹⁷ *W.R. Grace & Co.*, 638 So. 2d at 506.

liability; (2) but if I did, you should not add punitive damages because I deserve no punishment; and (3) but if I do deserve punishment, other jurors in other cases have already imposed it on me. One experienced trial lawyer ridiculed the notion that one could argue effectively such starkly contrasting alternative theories to a jury:

You know, you pay your \$100, you can have as many defenses as you want. You can say to the farmer who wants \$100 for his cabbages that your goat ate, you could say, "I don't have a goat. And if I had a goat, he didn't eat your cabbages. And if he did eat your cabbages, they weren't worth \$100. And if they were, my goat was insane."²¹⁸

Lawyers cannot hope to persuade a trier of fact by presenting stark self-contradiction, and so jurors will not know of past awards which some courts consider relevant to a proper determination of punitive awards.²¹⁹ Virtually guaranteeing that juries will decide punitive awards without information courts deem important seems to mock their very existence and ensure that they will not achieve a proper result.²²⁰

Even for the defendant not denying liability or arguing about punitive damages in a bifurcated trial,²²¹ there is grave danger in presenting the information that other triers of fact awarded punitive damages. The emotional nature of the evidence that underlies punitive damages militates against asking lay triers of fact to draw too careful a distinction about how the emotional evidence is to be used.²²² Indeed, even judges sometimes fail to focus on the doctrine that punitive damages are to be set with reference to the defendant, seeking to reduce them out of concern for the size of the windfall.²²³ If judges—who know the law or are trained to find it and who swear to uphold it as both lawyers and judges—focus incorrectly on the plaintiffs' receipt of punitive awards instead of defendants' forfeiture, then it may be expected that lay jurors might do the same. Jurors might conclude that if other plaintiffs "deserved" a certain punitive award arising from other cases of the same misconduct then the plaintiff at bar is no less deserving. Given the extreme ambiguity of jury instructions about how to

²¹⁸ J. Donald Bowen, *Symposium on Civil Litigation Reform*, 24 PEPP. L. REV. 887, 932 (1997) (discussing the role of punitive damages in civil litigation).

²¹⁹ See *supra* notes 215–17 and accompanying text.

²²⁰ See *id.*

²²¹ See *supra* note 75 and accompanying text for a discussion of the increasing use of bifurcated trials in punitive damage litigation.

²²² See *Arnold v. E. Airlines, Inc.*, 861 F.2d 186, 198 (4th Cir. 1982).

²²³ See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1396 (3d Cir. 1993) (Weis, J., dissenting); *Wolf v. Planned Prop. Mgmt.*, 735 F. Supp. 882, 887 (N.D. Ill. 1990) (reducing a \$100,000 punitive award to \$50,000 to avoid a windfall to the plaintiff); see also *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846 (Ky. 1986) (Vance, J., concurring) (stating that all punitive damages should be paid to the state treasury to avoid windfalls).

calculate the amounts of punitive awards, jurors might adopt the information of past awards as a welcome suggestion of the "proper" amount.²²⁴ Defendants should hesitate to introduce evidence of past punitive awards for fear that punitive damages given to other plaintiffs would not be used to reduce the award, but to set a minimum suggested damage figure where the instructions from the court are extremely vague.²²⁵

C. Summary of the Difficulties with the Commonly-Suggested Solutions

Abolition of the punitive damage remedy lies within the ambit of courts, but this solution does not allow them to continue to take advantage of the power of this longstanding remedy.²²⁶ The "first-come" rule is also within the purview of a common law court, but defendants will find it too easy to manipulate or to defeat the purposes for which punitive damages are available.²²⁷ Calls for legislative action have generally been met by arbitrary caps that are troubling because of their artificial, pre-set limits on a remedy that requires flexibility to be useful.²²⁸ Joinder of all plaintiffs into a single suit lies beyond the power of civil courts in the United States.²²⁹ Allowing defendants to argue mitigation because of past punitive awards to a jury is not a practical litigation tactic because it admits liability and punitive culpability in non-bifurcated trials, and even in bifurcated trials, suggests to the jury a necessarily high damage amount as strongly as it suggests a reason to mitigate damages.²³⁰ Of the remedies thus far considered, the ones courts can adopt under their own powers yield little, if any, improvement over the current system and the ones requiring legislation seem doomed either to be ignored or to result in the imposition of arbitrary rules that do not further the ends of justice.

Any alteration of punitive damages law that results in fewer or smaller punitive awards, including the proposal made below, lessens the power of the remedy to attract suits into court and punish and deter wrongdoers.²³¹ Empirical studies show that no crisis of overuse of punitive awards exists,²³² so it is only appropriate to limit punitive awards to achieve some worthy objective rather than limitation for its own sake. As set forth below, the proposal in this article would

²²⁴ See *supra* notes 57–69 and accompanying text for a discussion of the ambiguity of jury instructions for setting punitive award amounts.

²²⁵ See *supra* notes 49–69 and accompanying text (discussing the vagueness of instructions regarding the setting of punitive amounts).

²²⁶ See *supra* notes 134–44 and accompanying text.

²²⁷ See, e.g., *supra* notes 164–80 and accompanying text.

²²⁸ See, e.g., *supra* notes 193–208 and accompanying text.

²²⁹ See, e.g., *supra* notes 192–207 and accompanying text.

²³⁰ See *supra* notes 215–25 and accompanying text.

²³¹ See *supra* notes 30, 36 and accompanying text regarding the power of punitive damages to bring cases to court.

²³² See *supra* note 40 and accompanying text.

reduce the incentive to sue in some cases. However, that reduction is undertaken in the interest of eliminating the injustice of multiple punishments for a single act,²³³ while leaving the chance for punitive damages alive in any case where a trier of fact is convinced of the need to respond to outrageous acts with dramatic awards.

V. REFORM PROPOSAL: A PRECEDENTED CHANGE TO A MORE RATIONAL SYSTEM

The following Part sets forth the mechanics and advantages of a proposed system to eliminate unjust multiple awards of punitive damages. Section A explains the operation of the proposed setoff for punitive awards already paid while section B explores the expected benefits of adopting such a system.

A. Setoffs for Prior Awards of Punitive Damages

The essence of this proposed system is that once a defendant pays an initial dollar of punitive damages for a given misdeed, the defendant will never again have to pay that dollar to another plaintiff. Assume that a defendant has been ordered to pay \$100 in punitive damages for selling a faulty product that injured a user. The award reflects a trier of fact's judgment that punishing the bad act and deterring this actor and others from selling dangerous products requires a payment of \$100. When a second trier of fact assesses punitive damages for the sale of the same defective product to another user, it might also conclude that \$100 is the proper amount the defendant should pay to assure punishment and deterrence of the bad act. In such a case the second plaintiff would receive compensatory damages in full measure but no punitive damages; the second trier's decision that the defendant should pay \$100 will be respected, as that amount has already been paid, albeit to a different plaintiff. A third trier of fact in the hypothetical litigation might award \$300 in punitive damages, of which the third plaintiff will collect \$200. The first \$100 of punitive damages would have already been paid, leaving \$200 to be paid to satisfy the third trier's finding that the defendant should pay \$300 in punitive damages.

The proposed setoff is a small change to today's law which incorporates many features of the current punitive damage landscape. It leaves the jurisprudence of entitlement to punitive damages unchanged, altering only measurement of damages in multiple punitive damage cases. Juries would perform their traditional function of deciding the monetary value of compensation and would still decide how much the defendant should forfeit as a punitive award. Defendants would still have the burden of presenting proof to the court of

²³³ See *supra* text accompanying notes 4–6 (discussing the unfairness of multiple awards).

damages already paid to be eligible for the setoff.²³⁴ Today some courts reduce punitive damages in the cases before them because of possible future awards.²³⁵ However, evidence of other possible verdicts in the future, or even of an actual present verdict, would no longer reduce damages in the case at bar. Rather, courts would only accept proof of prior punitive awards actually paid. This change recognizes the solid empirical evidence that verdicts are often reduced by trial judges, by appeals, and by negotiation among the parties to litigation.²³⁶

Evidence of prior awards is not held irrelevant today when multiple awards of punitive damages occur,²³⁷ but courts have not formulated their concerns into a practical policy. Instead, defendants have the dubious right to argue to a trier of fact that they have been punished enough and so further awards of punitive damages are inappropriate.²³⁸ The prospect of opening the door to discussions of past misdeeds and judgments which would otherwise not be admissible and which could easily prejudice a jury will silence defendants' talk of mitigation.²³⁹ The solution is to have a court, rather than a jury, receive evidence of prior payments to minimize the danger of having a result-based decision, in which the trier picks a number as a final result and works backwards to achieve the desired result. There is evidence that juries conduct themselves this way at times.²⁴⁰ Some courts express concern for this tendency in other cases by not allowing juries to know that their award of damages is subject to trebling in RICO, antitrust, and other actions.²⁴¹ As in those cases, allowing judges rather than jurors to know of

²³⁴ See *supra* notes 215–20 and accompanying text (chronicling the courts currently placing this burden on defendants).

²³⁵ See, for example, the seminal case of *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839–40 (2d Cir. 1967), which, even as it declared that the court could find no principle by which to limit punitive damages because of future awards, did so by remittitur. See also *infra* note 261 (regarding consideration of past awards).

²³⁶ See *supra* notes 85–90 and accompanying text (reviewing some empirical studies on the reduction of punitive verdicts).

²³⁷ See *supra* notes 215–19 and accompanying text.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See, e.g., *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 447 (Wis. 1980) (discussing a Wisconsin case tried three times in which the three verdicts were: \$4,500 punitive and compensatory damages; \$4,500 compensatory damages; and \$2,500 compensatory, \$2,000 punitive damages) (citing *Bass v. Chicago & N.W. Ry. Co.*, 36 Wis. 450 (1874); 39 Wis. 636 (1876); 42 Wis. 654 (1877)). The Wisconsin Supreme Court cited this case as an example of how triers of fact may adjust the case to arrive at their desired result regardless of the law upon which they are instructed. *Id.* The view expressed in *Wangen* is supported by recent empirical research into jury behavior. See Michelle Chemikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313 (1999) (indicating that jurors would pay more compensatory damages to plaintiffs in identical cases when punitive damages are not made available or are paid to the state rather than to the plaintiff in an empirical study).

²⁴¹ See, e.g., *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 45 (2d Cir. 1994) (RICO) (citing

setoffs should avoid the problems of result-based decision making. Judges, one hopes, are more willing to follow the law and better able to understand it than are juries.²⁴²

Judges should also be able to grant setoffs for settlements paid, using the parties' own designation of whether monies paid are punitive or compensatory. Parties in personal injury cases would have incentives to assign amounts fairly between compensation and punitive amounts, since personal physical injury awards are non-taxable while punitive awards are taxed.²⁴³ Thus a physically injured plaintiff will wish to designate the entire amount of a settlement to compensation. The proposed setoff, however, gives defendants the opposite incentive, as punitive settlement dollars paid today reduce the amount of future punitive payments. Plaintiffs' and defendants' opposing incentives should assure a fairly negotiated allocation of damages. Where negotiation does not yield a realistic allocation, courts may take the lead of the Internal Revenue Service, which analyzes the pleadings to determine whether an allocation appears reasonable. The IRS makes its own allocation when parties suggest an allocation that does not reflect the reality of the suit.²⁴⁴ Judges might claim for themselves the same power, giving a setoff for a part of the settlement amount reasonably attributable to punitive damages. This would likely be necessary more often in

other cases); *Brooks v. Cook*, 938 F.2d 1048, 1052 (9th Cir. 1991), *appeal after remand*, 28 F.3d 105 (Table), No. 92-56232, 1994 WL 232272 (9th Cir. May 30, 1994), available at (unpublished opinion) (42 U.S.C. § 1983 claim for deprivation of constitutional rights); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308 n.7 (7th Cir. 1987) (RICO); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 860 (1st Cir. 1985) (antitrust); *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1091 (9th Cir. 1975), *vacated on other grounds*, 433 U.S. 904 (1977) (antitrust); *Blue Island, Inc. v. Taylor*, 706 S.W.2d 668, 670 (Tex. App. 1986) (consumer protection); 22 AM. JUR. 2D *Damages* § 987 (1964) ("In civil antitrust actions . . . it has generally been held improper to inform the jury of the statutory provision authorizing treble damages.") (footnote omitted). *But see, e.g., Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 852 (5th Cir. 1975) (holding that informing the jury of trebling of damages was harmless error in an antitrust case); *Real v. Cont'l Group, Inc.*, 627 F. Supp. 434, 450 (N.D. Cal. 1986) (declining to follow a line of antitrust cases holding that juries should not know of damage multipliers and allowing the jury to know of a multiplier in an employment discrimination case); *Wanetick v. Gateway Mitsubishi*, 750 A.2d 79, 84 (N.J. 2000) (allowing the jury to be told of a damage multiplier in a consumer protection case).

²⁴² *But see, e.g., Winston Corp. v. Park Elec. Co.*, 203 S.E.2d 753, 753 n.1 (Ga. App. 1973) (containing the inimitable Judge Sol Clark's "story . . . of the attorney who during argument on his appeal was told, 'You may presume the court knows the law' and replied 'That was the mistake I made in the trial court'").

²⁴³ See 26 U.S.C. § 104(a)(2) (2000).

²⁴⁴ See, e.g., *Bagley v. Comm'r*, 105 T.C. 396 (1995) (holding the IRS is not bound by a settlement agreement allocating 100% of a \$1.5 million award to personal injuries when a previous jury had awarded \$1 million for injuries and \$500,000 for punitive damages); *Robinson v. Comm'r*, 102 T.C. 116 (1994) (holding that the IRS is not bound by a settlement in which defendant with little incentive to negotiate acquiesced in an unrealistic allocation of an award).

cases not involving physical injury, where the tax code provides less incentive to make parties allocate damages fairly.²⁴⁵

B. Advantages of Implementing a Judicial Setoff for Punitive Awards Previously Paid

1. Fairness

The unfairness of multiple judgments would disappear if judges adopt a dollar-for-dollar setoff for prior punitive awards paid. Today, multiple punishments could be endless and devastating for defendants. Instead, later punitive awards would begin to impose punishment only when a later trier of fact believes a larger award is needed to punish and deter the bad conduct. In such a case the defendant will pay the largest award any one trier of fact believed necessary but will not have to pay duplicative dollars in punishment.

The basic unfairness of multiple punishments for the same act stems from multiple punishers acting independently.²⁴⁶ The "first-comer" and joinder proposals discussed above address the problem by permitting only one punitive award.²⁴⁷ The proposal for setoffs made in this article also finds justice in respecting a single verdict; not the first verdict, but the highest one. A number of factors might determine which of many plaintiffs receives the highest punitive award. It might be a function of the proclivities of the jurisdiction in which the plaintiff brings the claim,²⁴⁸ which would honor the traditional power of plaintiffs to choose their forum.²⁴⁹ High verdicts might be a function of a growing understanding of a defendant's wrongs, in which case later triers might be more incensed than earlier ones whose decisions were not informed by emerging evidence about the perfidy of a defendant.²⁵⁰ Whatever the reason for higher verdicts, if the defendant pays only the amount of the highest single verdict imposed, there can be no overkill from multiple verdicts. Moreover, all plaintiffs will have a chance to receive punitive damages, even if the first plaintiff whose case comes to judgment enjoys the best chance of recovery. There seems no

²⁴⁵ See *Robinson*, 102 T.C. at 116; *McKay v. Comm'r*, 102 T.C. 465 (1994) (respecting parties' allocation of damages where they resulted from adversarial negotiations).

²⁴⁶ See *supra* text accompanying notes 4–6.

²⁴⁷ See *supra* notes 145–82, 209–14 and accompanying text. For "first-comer" the single award goes to the first plaintiff to reach judgment. All suits thereafter would not permit consideration of punitive damages. For joinder of all parties, only one suit would be litigated, hence, there could be no multiple punitive awards.

²⁴⁸ See *supra* notes 159, 162 and accompanying text for a discussion of jurisdictional differences in punitive awards.

²⁴⁹ See, e.g., *Berman v. Airlift Int'l, Inc.*, 302 F. Supp. 1203, 1208 (N.D. Ga. 1969) (stating a policy to "reward the diligent plaintiff by allowing him his choice of venue").

²⁵⁰ See *supra* notes 167–72 and accompanying text.

injustice in giving diligent plaintiffs with diligent lawyers the best opportunity to receive punitive damages, particularly in a path-breaking lawsuit.²⁵¹ Finally, a defendant who pays exactly the amount of the highest award will be punished as much as any trier of fact felt necessary, suffering a smaller total judgment by not being forced to pay the same amount for punishment and deterrence many times over due to multiple awards.²⁵²

2. Predictability and Respect for Juries

Judges today freely substitute their own judgment for that of juries in setting the amount of punitive awards.²⁵³ They do so using information unavailable to jurors, such as other verdicts, past or predicted.²⁵⁴ Worse, they act on their own estimates of a murky future, applying unclear decision rules to their guesses. For example, if a judge believed ten suits regarding a single tortious course of action will come to verdict with \$100,000 in punitive damages in each suit, what should be done with the \$500,000 punitive verdict in the suit presently before that judge? It is hard to believe that all, or even most, judges will agree on the amount of punitive damage remittitur in such a case.²⁵⁵ The resulting uncertainty defeats one role of the law, which is to allow lawyers to advise clients at least as to what standards courts will apply, if not about the actual dollars likely to be awarded. Predictability of the rules and standards, something lawyers crave, suffers when the judge might reduce punitive damage awards pursuant to no definable standard.

By contrast, the proposed system offers both greater respect for juries and far less uncertainty about the reason for reducing awards.²⁵⁶ The first judge to reach a verdict in a given case will have no reason to reduce the verdict to allow for future litigants' possible punitive awards.²⁵⁷ The reward of having no setoff to reduce damages will go to the diligent litigant who first prosecutes the case to a verdict, without providing defendants a financial incentive to manipulate verdicts as with

²⁵¹ See, e.g., *United States v. Wallace*, 492 F. Supp. 976, 979 (E.D. Va. 1980) (acknowledging a desire to reward the diligent party to litigation); *Berman*, 302 F. Supp. at 1208 (acknowledging the same).

²⁵² See *supra* notes 234–45 and accompanying text.

²⁵³ See *supra* notes 78–79, 102–08 and accompanying text.

²⁵⁴ See, e.g., *supra* notes 105–08 and accompanying text.

²⁵⁵ See *supra* text accompanying note 58.

²⁵⁶ Uncertainty about the amount of punitive damages is a good thing because it deprives wrongdoers of the ability to calculate the costs of a bad act. See *supra* notes 66–67. Uncertainty about the judge's standards, however, seems far less desirable as it implies a standardless system of punishment. See, e.g., *supra* note 58 and accompanying text (stating lack of legislative guidance regarding amounts of punitive awards as an inadequacy of the law).

²⁵⁷ This is precisely what the Second Circuit Court of Appeals did in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967).

a “first-come” scheme.²⁵⁸ Later judges, when presented with proof of prior awards paid, will be able to reduce punitive awards on evidence as solid as canceled checks rather than on highly uncertain estimates of future events. Knowing that an objective, easily-calculable method exists for reducing punitive damages—one grounded in the purpose of punitive awards and which will not permit multiple awards to impose upon defendants duplicative overkill—judges may believe themselves more free to allow jury verdicts to stand. Jurors’ findings need no longer be lightly disregarded to avoid overkill, but can be respected for what they are: a decision about how much money the defendant should forfeit, regardless of who gets (or has already gotten) the money.

Plaintiffs’ lawyers would presumably be able to learn in discovery what awards have been paid and will thus be better able to advise clients than they can today. They would still face the eternal, daunting task of estimating the odds of victory and what a jury might award a plaintiff,²⁵⁹ but at least there can be greater certainty about how judges will treat any punitive awards a jury might make. Uncertainty as to the size of awards allows punitive damages to discourage bad conduct.²⁶⁰ Uncertainty as to the standards judges apply, however, leads only to disrespect for the law. Some courts already state the appropriateness of considering prior awards, but do not say how they use this information.²⁶¹ This setoff calculation gives their amorphous instruction a clear, easy-to-calculate form.

3. *The Proposal Does Not Depend Upon Legislative Action*

A central feature of the proposed setoff is that judges have the power to enact it without legislative action. A proposal for legislatively-mandated punitive damage setoffs appeared in the scholarly literature over two decades ago.²⁶² Since then the most popular legislative intervention has been the imposition of caps and

²⁵⁸ See *supra* notes 156–75 and accompanying text.

²⁵⁹ See *Georgia Cas. v. Mann*, 46 S.W.2d 777, 779 (Ky. 1932).

²⁶⁰ See *supra* notes 58, 66–67 and accompanying text.

²⁶¹ See, e.g., *Pickering v. Owens-Corning Fiberglas Corp.*, 638 N.E.2d 1127, 1142 (Ill. Ct. App. 1994) (stating only that a court should “consider” past and potential punitive awards when assessing punitive damages); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 866 (Iowa 1994) (stating only that courts are free to consider past awards in assessing punitive damages); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (“[T]rial courts are expressly authorized to consider prior punitive damage awards.”). Even the Restatement (Second) of Torts states only that it is appropriate to consider other awards, but does not specify how the court is to weigh them as it assesses punitive damages. RESTATEMENT (SECOND) OF TORTS § 908, cmt. e (1977).

²⁶² See Alan Shulkin, Comment, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979) (suggesting that an offset for prior punitive damages paid be enacted by legislation).

ratios, which limit arbitrarily the amount of punitive damages to be paid.²⁶³ There is little reason to believe lawmakers will do better in the future, but judges have the power to reshape punitive damages in multiple-party litigation today. Moreover, some courts have expressed separation of powers concerns when legislatures interfere with adjudicating damages.²⁶⁴ Perhaps judges should aspire to solve this problem without legislative interference. Courts, which have the power to ban the remedy entirely,²⁶⁵ surely have the power to alter it in less radical ways.

The frequent use of remittitur, pursuant to ill-defined standards of how much money feels like enough to punish and deter, demonstrates judges' desire to regulate punitive awards.²⁶⁶ Judges already inclined to reduce damages could still do so if they adopt the proposed setoff. By employing the setoff to reduce damages they would have reduced anyway, they give impetus to a system more rational, more fair, and more easily explained to clients than the current one. Judges in other jurisdictions that have not yet reached the question will not be bound to follow the setoff approach, but as more precedent accrues, a consensus may take shape that a setoff should be the law.²⁶⁷

²⁶³ See Beasley, *supra* note 13; *supra* notes 193–208 (regarding punitive damage caps). Exceptions include Florida and Missouri. FL. STAT. ANN. § 768.73 (West 2000) (adopting seemingly irreconcilable provisions that purport to enact both setoffs for past awards and a “first-come” rule, in addition to caps and multipliers); MO. REV. STAT. § 510.263(4) (2000) (adopting a dollar-for-dollar setoff for prior punitive damages paid which arise out of the same conduct). Reported opinions in Missouri give little indication of how courts are applying the statute. Courts of other states, which have the power to enact a setoff by common law, might find support in Missouri’s having enacted them by statute. See *infra* note 267 for an analogous situation.

²⁶⁴ See, e.g., *Cronin v. Sheldon*, 991 P.2d 231 (Ariz. 1999); cf. *Lakin v. Senco Products*, 987 P.2d 463 (Or. 1999).

²⁶⁵ See *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *supra* text accompanying note 4.

²⁶⁶ See *supra* notes 79–89 and accompanying text.

²⁶⁷ A change in tort law roughly analogous to the one proposed in this article recently took place when states changed from contributory negligence to comparative negligence. The change was made by legislation in many cases. See, e.g., 57B AM. JUR. 2D *Negligence* § 1130 (1964). A number of state legislatures, however, did not legislate the change so courts began to change the law by overturning the prior doctrine of contributory negligence. See, e.g., *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983). The Florida Supreme Court cited above saw the need for high-minded prose and examinations of the nature of common law and precedent when undertaking such a dramatic change, but it concluded it had the power, saw the need, and did its duty by changing the law in so dramatic a way. *Hoffman*, 280 So. 2d at 436–38. Florida, which made its change in 1973, did a great deal to justify its departure from prior law. Missouri, in a much shorter opinion ten years later, was able to base its shift to comparative negligence in part on the fact that “[f]orty states, Puerto Rico, and the Virgin Islands now utilize some form of comparative fault.” *Gustafson*, 661 S.W.2d at 13. The momentum comparative negligence gained by its adoption in so many other jurisdictions appears to have made it easier for the Missouri Supreme Court to justify its decision.

Not only might the setoff allow the continued use of punitive damages without the fear of overkill, it might discourage the popular legislative interventions that arbitrarily weaken the remedy.²⁶⁸ Contrary to the pleas judges have made for a national regulation to stop punitive damage overkill, judicial action has the potential to improve this area of law.

VI. CONCLUSION

Numerous courts acknowledge that imposition of multiple punitive damages on a single defendant for a single act or course of action works an injustice.²⁶⁹ They then claim that they are helpless to solve the problem and meekly ask for national legislation.²⁷⁰ Meanwhile, individual states address the problem in arbitrary ways that do not serve the basic policies for which punitive damages exist.²⁷¹ By adopting a setoff for punitive awards already paid for a single act or course of action, judges could create a more fair system while allowing punitive damages to serve the policies for which they were created, all without legislative intervention of any sort.²⁷² Judges have the power to fix the injustice they have recognized. It remains for them to use it.

The Missouri legislature has taken the lead in passing a setoff law like the common law plan proposed in this article. *See supra* note 263. This precedent may make it easier for judges of other states to enact the change under their own powers. Further, it may be anticipated that if judges begin to grant dollar-for-dollar offsets for prior punitive damages, making explicit that they are setting a precedent for how to avoid "overkill," other jurisdictions may be able to follow suit without elaborate justifications.

²⁶⁸ *See supra* notes 193–206 and accompanying text for a discussion of legislatures' most frequent interventions and their weaknesses.

²⁶⁹ *See supra* notes 115–22 and accompanying text.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *See supra* notes 234–68 and accompanying text.